UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff, - vs. – AUSTRALIAN GOLD, INC., Defendant.	CIVIL ACTION NO. 05-CV-1217 (JS) (MLO)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, - vs. – LARRY SAGARIN AND JOHN DOES 1-10, Third Party Defendants.	**AFFIRMATION OF** **RONALD D. COLEMAN, ESQ.**

RONALD D. COLEMAN, under penalty of perjury, states as follows:

1. I am a partner at Bragar Wexler & Eagel, P.C., and was formerly a partner at the Coleman Law Firm, a Professional Corporation, attorneys for S&L Vitamins, Inc., the plaintiff/counterclaim defendant, and Larry Sagarin, the third party defendant ("S&L"), in this case. I am familiar with the record in this case, and I make this affirmation based on personal knowledge.

2. Defendants did not identify, during discovery, any of S&L's suppliers as having been Premier Salons subject to the Premier Salon Agreement, other than Yucatan.

3. Defendants did not identify, during discovery, any of S&L's suppliers as having been Australian Gold distributors.

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4. The Premier Salon Agreement contract supplied by defendants is attached as Exhibit A.

5. Defendants did not produce, in discovery, any substantive expert report, financial records, evidence of lost sales, or evidence of disruption of its distribution network attributable to S&L Vitamins.

6. Attached hereto as Exhibit B is the "Damages worksheet" produced by Australian Gold.

7. There is no explanation on the "Damages worksheet" of the manner in which the "allocation" of damages, shown by percentage of the line items set forth, was made.

8. Attached hereto as Exhibit C are excerpts from the deposition testimony of Larry Sagarin referred to in the Rule 56.1 statement of S&L.

9. Attached hereto as Exhibit D are excerpts from the deposition testimony of Steve Mercadante referred to in the Rule 56.1 statement of S&L.

10. Attached hereto as Exhibit E are excerpts from the deposition testimony of Leslie Hartlieb referred to in the Rule 56.1 statement of S&L.

11. Attached hereto as Exhibit F are excerpts from the deposition testimony of Danny Sheehan, the principal of Yucatan Tanning, referred to in the Rule 56.1 statement of S&L.

12. Attached hereto as Exhibit G are excerpts from Australian Gold's Responses to Interrogatories referred to in the Rule 56.1 statement of S&L.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge, information and belief.

Dated: New York, New York
December 11, 2006

By: /s/
RONALD D. COLEMAN

EXHIBIT A

Australian Gold® & Swedish Beauty®

Premier Salon Bonus Cash Back Partnership Program
3-Year Agreement

Yucatan (Name of salon) agrees to feature, display, offer to sell, recommend, endorse or otherwise promote only [Aus]tralian Gold® and/or Swedish Beauty® lotion in the salon. Features include displays and advertisement of Australian Gold and/or [Swe]dish Beauty in your salon for the period of the promotional years [11-]01-02 to 10-31-03, 11-01-03 to 10-31-04, and 11-01-04 to 10-31-05.

[In re]turn for the feature promotion, the salon will receive the following rewards:

1. Double Co-op Advertising Allowance on Australian Gold and Swedish Beauty lotions. Example) Current program of AG - 4%, SB - 4%, and 2% bonus for $5,000 purchases will be doubled to 18%.

2. Initial Promotional Package- worth over $500 & a comparable package will be supplied in following 2 years. Following are components of the initial package:

A.	Choice of AG or SB lighted sign	H.	1 pack (12) Eye Candy & 1 Pack of Sun Globes
B.	AG and SB window clings	I.	2 AG or SB polos
C.	10 AG or SB salon staff T-Shirts	J.	1 Qt. AG disinfectant
D.	10 AG or SB hats	K.	Director's Chair
E.	50 each AG and SB consumer brochures	L.	5 Plastic Signs
F.	5 rolls of No Reps	M.	4 Bottles of Extreme Dare
G.	5 assorted posters	N.	Premier Website*

[Plea]se Specify the type of kit you are requesting:
[Combi]nation of Australian Gold & Swedish Beauty: ______ Australian Gold Only: ______ Swedish Beauty Only: ______

3. *New for 2003 is a special restricted website with password entry and protection which offers an exciting new Postcard Program. For 2003 we are offering 10% off on ALL postcard purchases!

4. Special Promotional Bonus on Spiff Cash Back Programs. In the months of March and May ETS will select 3 AG and 3 SB products to have Spiff amounts doubled.

5. Each salon location receives 2 free training manuals and 1 salon manufacturers training session per year, as scheduled by ETS.

__________ (Distributor name) will submit all information (invoices, advertisements, etc.) directly to ETS for [reimbur]sement for __________ (name of salon). Should the salon decide to change Distributors during the [agreement, you] are required to notify AG/SB, in writing, of the reasons for the change, in order for ETS to be able to verify which distributor [is s]ubmitting paperwork for your claim. Please send to ETS at 6270 Corporate Drive, Indianapolis, IN 46278, Attention: John

Yucatan Tanning Salon Name
Danny Sheehan Owner's Name
Danny Sheehan Signed Danny Sheehan 4/7/03
79 W. Main St Address
Smithtown NY 11787
312650009 Telephone Number
E-mail Address
__________ Website
4/7/03 Date

[illegible] IND Distributor Name
Kevin Bentley Distributor Owner
4/7/03 Date

For Internal Purposes Only:
Premier Salon User Name: __________
Premier Salon Password: __________

__________ AG/SB Director of Business Development __________ Date

Tracy Ring

From: Dana Pato [danapato@futureindustries.com]
Sent: Friday, April 14, 2006 11:25 AM
To: Tracy Ring
Cc: Future Industries Michelek
Subject: Yucatan

To whom it may concern,

Danny Sheehan of Yucatan, Smithtown, New York location gave me permission to sign his 3 year premiere on April 7, 2003.

Thank You
Dana

Dana M Pato
Sales Consultant
Future Industries
626 Surf Ave
Stratford, Ct 06615
800-346-3136 Ext 103

EXHIBIT B

Damages worksheet

Description and Allocated %	**2005**	**2004**	**2003**
	Allocated amounts for Internet abuse		
45% Customer service rep	$15,000.00	$15,000.00	$10,000.00
10% Executives, Sales Director	$40,000.00	$35,000.00	$40,000.00
5% rep time answering calls and complaints	$20,000.00	$20,000.00	$17,500.00
60%Trainers	$60,000.00	$36,000.00	$20,000.00
40% Travel expenses	$100,000.00	$90,000.00	$60,000.00
5% Sales Bonus	$12,000.00	$10,000.00	$8,000.00
Costs of trademarks and copyrights	$250,000.00	$300,000.00	$250,000.00
Contract negotiation fees	$5,000.00	$2,500.00	$2,500.00
Product training samples	$100,000.00	$100,000.00	$100,000.00
20 % Product training seminars	$60,000.00	$50,000.00	$20,000.00
5% Distributor/Salon council	$5,000.00	$5,000.00	$5,000.00
20% Tradeshow training	$50,000.00	$50,000.00	$55,000.00
Additional costs and lost customers			
	$717,000.00	$713,500.00	$588,000.00

$2,018,500.00

EXHIBIT C

A Containing the tanning lotion.

Q The box from the distributor or the box from like Mr. Sheehan?

A I don't understand.

Q You said it comes in the box. Who puts what in the box?

A I place an order with Danny. Danny places an order with whoever he places an order with. I go pick up the order.

If I happen to open the box up and there's a catalog in there, so I would assume the distributor put it in the box.

Q Did you take the photographs shown here in Exhibit 7?

A No.

Q Did you have someone take the photographs in Exhibit 7 for you?

A Yes.

Q What's the name of the photographer?

A Helen Sagarin.

Q Who?

A Helen Sagarin.

Q Did you keep it a secret that Helen Sagarin took pictures of these products?

A No.

Q Did you ever use a professional photographer?

A My sister, Elizabeth Sagarin.

Q Were they paid for this work?

A Yes.

Q After they took these photographs, did they doing anything else with the raw photographs, as far as -- and I'm talking about Exhibit 7 only here, did they do anything else with the photographs other than give them to you?

A No. E-mailed them to us.

Q Who decided how the products should be displayed in these photographs?

A I did.

Q Why are some products shown with the box and some aren't?

A Because I believe I looked at the Australian Gold website and saw how they displayed and that's how we displayed them, like they displayed them.

Q Are you pretty familiar with the Internet?

A Define familiar. I don't know.

Q I mean, do you know how to get on it and search and browse and do things of that nature?

A Absolutely, yes.

Q And did you ever right click over a photograph and cut or copy it?

A As embarrassing as this sounds, I only learned how do that, like 18 months ago, what the right side of the mouse does.

Q Did you ever do that with any other Australian Gold, Swedish Beauty or Caribbean Gold product?

A No.

Q If you look at Blazen' on that left column, third one down, there appears to be something superimposed over the product. Do you know what that says?

A No.

Q Do you know who put that there?

A It had to be the photographer.

MR. COLEMAN: I just object to the form because I don't see anything -- you see something sticking out of the top?

MR. MATTHEWS: Yes.

THE WITNESS: You're talking about that

little blurb, whatever that is?

MR. COLEMAN: To me, looking at the picture, I can't agree that anything is necessarily superimposed.

MR. MATTHEWS: Wait, don't testify for him, Ron.

MR. COLEMAN: Because on the raw transcript, it's going to look like there's been an acknowledgement of some kind of superimposition. All I see is a smudge.

MR. MATTHEWS: All right.

Q I'll represent to you this website page was pulled from the Internet on April 19, 2004.

A Okay.

Q At that time, were you the one that put these photographs on the website or did someone else do it?

A Either Steven or myself.

Q Has anyone other than Steven or yourself ever put photographs Australian Gold, Swedish Beauty or Caribbean Gold products on your websites?

A No.

Q If you look at the last page, 3 of 3.

Q The first page, the phone number (631) 225-BODY, at what location does that number ring?
A Montauk Highway, Lindenhurst, New York.
Q How do you determine what price you'll sell these products for?
A I just go, these are nice prices, too. I wish I was selling this stuff for these prices now. Competition.
Q Who is your competition?
A AMAZON.COM, Ebay, Best Indoor Lotion, Tan Today, Best Price Lotion, World Class Nutrition. Oh, God, there's so many more, Cheap Lotions.
Q But generally, the websites are your competitors?
A Generally, yes.
Q Does Helen Sagarin pay any fees to S&L Vitamins for being associated with S&L Vitamins's web?
A No.
Q Does Helen Sagarin's Body Source pay any fees associated with maintaining the website?
A I don't understand.
Q Don't you have like a monthly service

A Based on competitor's prices. Try to be competitive with the other people out there.

Q So you'll do your markup, and you'll want to try to get your 40 percent margin and if it's higher than a competitor's you may mark it down to compete?

A It's retail. Be it Internet, be it walk-in, that is retail.

Q Who does S&L Vitamins buy its tanning lotions from?

A Dominic, Danny, John, Joe.

Q Just so I have a good record, Danny Sheehan?

A I'm sorry, I just wanted to be cute. Danny Sheehan, John Tufarella and Joe Ferrara.

MR. MATTHEWS: Let's take a break.

(A recess was taken.)

Q Have you bought any brand of tanning lotions from anyone other than the four individuals you just identified?

A Yes.

Q Who else?

A Direct manufacturers. Would you like me to list the manufacturers for you?

Q Yes.

A Hoss Hauce, Vegas Tan, Millennium Tan, Performance Brands, which represents five or six -- four or five different types of locations.

Q Are they a distributor?

A No, they're a manufacturer.

Q But they manufacture four or five --

A They manufacture Fiesta Sun, Pro Tan, EXP Spray Tan Systems, Ultimate Tanning, Mist Sun Care, I think. I think so.

Q That's a fair representation, do any of these manufacturers object to you selling the products on the Internet?

A No.

Q Do you tell them that you're selling the products on the Internet?

A Yes.

Q Do they ask?

A If they do, I tell them.

Q But to your knowledge, none of these direct manufacturers you listed have objected to you selling the products on the Internet?

A They are more than happy to get an order.

Q What products do you buy from Dominic, Joe, Danny and John?

A Joe is the SPF line, the spray.

Q Outdoor products primarily?

A Correct. And the other three, I'll represent, Dominic, Danny, John are the indoor line and a little bit of the outdoor line lotion.

Q I assume that the four specific individuals don't supply you products that you can obtain directly from the manufacturer; is that correct?

A That is correct.

Q What brands do they supply Australian Gold, for example, Australian Gold, Designer Skin, whatever they might be?

A Australian Gold, Designer Skin, Supre, that's pretty much it.

Q Did they supply you California Tan in the past?

A In the past.

Q Is there a reason that you use those four individuals to obtain Australian Gold, Designer Skin, Supre and California Tan because manufacturers would not sell to you directly if you were selling on the Internet?

A Absolutely, yes.

Q Is it your understanding that all of those manufacturers I just listed have prohibitions against sales or have policies against sales on the Internet?

A Can you list the manufacturers?

Q Sure. Designer Skin, Supre, Australian Gold, California Tan?

A I'm aware they do have policies, yes.

Q Do you use one supplier more than the other?

A I have a soft spot in my heart for Danny Sheehan.

Q Why is that?

A I've known him for a long time.

Q I assume you guys were friends before you --

A Yes.

Q -- went into business together?

A Yes.

Q Or do business together?

A Correct, right. I understand.

Q How did you and Mr. Sheehan hook up for order?

A Yes.

Q How was that handled? Is that through the tanning salon from which you purchased the products?

A Yes.

Q Have you ever had any communications with distributors that supply the products for the tanning salons?

A No.

Q Have you ever attempted to place an order directly with a distributor?

A No.

Q When did you tell Danny Sheehan, if at all, you were selling products on the Internet, was that with that letter?

A No. It was probably prior to that, but I don't remember specific date or conversation that occurred. Danny knew I was selling it on the Internet.

Q That wasn't a secret?

A No secrets.

Q In relation to when you first started selling tanning lotions on the Internet and

A TANTALK.COM.
Q What is TANTALK.COM?
A It's a message board for people who tan.
Q Is it an industry-related board focused on tanning salons or the end users?
A Both.
Q What was said about the Australian Gold do not sell list on TANTALK.COM?
A Nothing that I'm aware of. It was posted on there and that's how I obtained it.
Q Was your name on there?
A Yes.
Q Do you know the date of the do not sell list?
A No, I do not.
Q Do you know what name appeared on there, was it S&L Vitamins or was it --
A Body Source, my mother's name was on there surprisingly. I don't know why and actually the Miller Place store was on there. I don't know why.
Q Helen Sagarin individually was on there?
A Helen -- I think so. I believe so, yes.
Q Have you ever received a disk that

contained images of Australian Gold, Swedish Beauty products?

A No.

Q Does Body Source have any intention to put a tanning bed inside of its retail location?

A No.

Q You would agree with me that Body Source is not a tanning salon?

A I would agree with you, yes.

Q We served some interrogatories on you that you provided a response under oath. I just have a few followup questions. Mr. Stein sent Mr. Earley a letter providing some supplemental responses at the request from us.

And one of the questions dealt with monetary damages that you have sustained. And one statement Mr. Stein made is plaintiff's business has been crippled with this litigation with its suppliers refusing do business with plaintiff as a result of Australian Gold's harassment of those suppliers.

Two questions. First, what suppliers, if any, have refused to do business with S&L Vitamins?

EXHIBIT D

Q I'm sorry.

A Lotions weren't on there until December '03, '04 or something like that.

Q But in any event, your testimony is that you told Mr. Sheehan pretty much from the beginning what you're doing with the tanning lotions?

A No, I didn't tell Mr. Sheehan anything in the beginning. But over conversations, the multiple conversations I've had with Mr. Sheehan between now and 2004 I'm sure it's come up that I'm buying it to sell on the Internet. It's no secret.

Q Has S&L Vitamins made any attempts to purchase the product directly from a distributor?

A No.

Q Why not?

A We weren't really buying much early on. We liked Danny. We liked the relationship with Danny. Shortly thereafter, we had received our cease and desist letter from Australian Gold.

Q What was the terms of the deal between Danny after that initial swap of products? You said that you needed more lotions and he needed

Q And this just represents sales at the 308 East Montauk Highway store, correct?
A Yes.
Q Any stores that were at Jericho Turnpike or at Miller Place would not be reflected on this tax return?
A No, they would not.
Q Look at Exhibit 2. On this return, it -- is this S&L Vitamins' tax return for 2001?
A It looks to be, yes.
Q On the income line on 1C, it says, $286,664. Was that S&L Vitamins' gross receipts for that year?
A Looks that way.
Q Again, in 2001, was S&L Vitamins just selling the nutritional supplements at that time?
A Yes.
Q It was not selling tanning lotions at that time?
A No, it was not.
Q Now, again, if you go back to the fifth page of this exhibit, this is a schedule K-1 and it's issued or shows a shareholder as Steven Mercadante, correct?

MR. COLEMAN: Object to the form. Asking a compound question.

MR. MATTHEWS: Let the record show there is laughter in the room.

A Please repeat the question.

Q Yes. Let's break it up. Where is the competition coming from now that wasn't there last year?

A Other websites, Ebay is a tremendous competitor, tremendous competitor. They get bigger and bigger and bigger. Other websites that look and do exactly the same thing that we do. Any given day, you'll find a whole bunch.

Q Are there any competitors that you've identified or targeted and said this is a website or an Ebay seller that we have to watch --

A Of course.

Q -- who are your competitors?

A Well --

MR. COLEMAN: Sure.

A Ebay, number 1. I mean, type in Australian Gold on Ebay search, you'll get about 2,000 or 3,000 listings, that's just Australian Gold. That's not Swedish Beauty, Caribbean Gold, World Class Nutrition.

Q Is that a website, World Class Nutrition?

A I'm sure you're familiar with World Class Nutrition.

Q Actually, I'm not. Who is World Class Nutrition?

A World Class Nutrition is a competitor of ours. They do have the whole line of Australian Gold products, Swedish Beauty products, with a statement saying that they have agreed with Australian Gold to stop selling the product as soon as they run out of inventory.

And that note has been up there for months and months. And they haven't changed any item.

Q When did you first recognize World Class Nutrition as a competitor of yours.

A I would say this time last year. There are others.

Q Is World Class Nutrition selling the 2006 product line?

A I don't know.

Q Have you checked or --

A I haven't checked in the past few days. I don't know if they are selling 2006. I know they're selling everything else.

In my experience, everything else sells better than the 2006 line anyway, so that's what I'm concerned about moreover.

Q Any other competitors that has cost more competition to you?

A If I can jump on her computer, I can probably find about 15 websites in about 10 minutes.

Q As we sit here, any others that are significant that you can think of?

A Not that I care to say.

Q What do you mean by that, that you care to say? I don't understand what your issue is, you don't want to rat out somebody else that you're in business with or you're talking with?

A I'm not talking with anybody. I do view other people just to find out as far as pricing, where do I need to be to be competitive. Internet Tan is one, Lotions for You.

I mean, because I don't want to say it because I look at other websites that do not carry the Australian Gold line for pricing on other manufacturers as well. So I don't want to give a name and be incorrect. But there are --

MR. COLEMAN: Steve, you just give the best testimony you can. These are questions that you do have to answer. There's no privilege attached to them.

A I would like to say, I think, like Lotions for You may, but --

MR. COLEMAN: We'll be clear. No one's getting sued on the basis of your testimony except you.

MR. MATTHEWS: That's actually incorrect, but --

A Internet Tanning. There's Lotion Source, Lotions View, Tanning Lotion Warehouse. There's a litany of them.

Q Is anything with respect to your pricing from Mr. Sheehan changed as far as the percentage he'll sell Australian Gold products to you?

A It has at this point, yes.

Q How has that changed?

A Now he gives 10 percent on everything.

Q What was the effective date of 10

EXHIBIT E

A. Do training, education, basic business.
Q. Does it charge for training and education, or is that part of its support?
A. Part of its service to our customers.
Q. Service to your customers. Would it beåôair to characterize that as support for the sales function?
A. Some is done before sales, some after, so.
Q. Now, is there a bright line between outdoor tanning products and indoor tanning products at Australian Gold, or was there when you first started? And when -- when Australian Gold had an outdoor tanning division and an indoor tanning -- tanning division, were -- was there ever -- was -- are there any products that are -- that are sold by both?
A. We do have the ability to sell some of the SPF products to salons so that they can offer a service to their customers, because generally people if they're coming to the salon to tan, they're looking at them as the experts, and so if they're going before

a vacation, they may want to buy SPFs from the same product line that they're using in order to take it on vacation to protect their skin and outdoor --
Q. Okay. We may be getting ahead of my ouline, but since you've raised it, when you say "SPF," what is it you mean?
A. Sun Protection Factor Products.
Q. Sun Pro -- that -- that means -- does that mean tanning lotions that have SPF?
A. Yes.
Q. There are tanning products that do not have SPF; is that correct?
A. Yes.
Q. And are those exclusively indoor tanning products?
A. We have a line of outdoor products that don't contain sunscreens that are for sale. They're sold in Florida for people, you know, just like they use baby oil. It's an option for them.
Q. There are people who tan in baby oil?
A. There's people that tan in Crisco, so, yes.
Q. I'm remembering the 60s people doing

that. Remember those -- those tin foil things.
A. I've heard motor oil. I've never seen it, so.
Q. So there are -- so there are nonindoor SPFs that would be sold only by the outdoor tanning --
A. Uh-huh.
Q. -- at this point would be -- it would be Australian Gold.
A. Uh-huh.
Q. And there are -- there are outdoor tanning products that are from time to time sold through ETS as a service to salon customers.
A. Yes.
Q. Does Australian Gold recommend the use of non-SPF tanning lotions outdoors?
A. No.
Q. Why not?
A. Because in a tanning salon we're able to recommend tanning equipment that is for their skin type. The timers are regulated to provide the maximum amount of tanning exposure for their skin type. Outdoor, it

can range anywhere from -- depending where you are, I mean, at -- at the equator to Minnesota. I mean, there's no controlling it. You don't know what you're getting. If it's a cloudy day, you're still getting UV rays and you don't -- don't realize what you're getting.
Q. Is it the case that the purpose of the SPFs is to protect from UV rays?
A. Yes.
Q. Ultraviolet rays?
A. (Nodding.)
Q. Are ultraviolet rays not an issue for indoor tanning?
A. Indoor tanning is ultraviolet rays. They're just regulated, controlled.
Q. Okay. So if I understand properly, is -- are you saying that because there's such a fine degree of control regarding the amount of exposure and the period of exposure and the analysis of skin type in a salon environment that it is not necessary -- or -- or that that SP -- that SPF lotions are not used in -- for indoor tanning?
A. They may be used but

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Q. To some extent, I -- is it the case that customers would resist using them, because they're --
A. They're coming to the salon to get a tan to feel better about themselves.
Q. And the -- and the distinction --
A. And SPFs would prevent that.
Q. Or -- or would -- understood. Okay.
A. But there are some people -- like there are many women that put SPFs on their face and tan the rest of their body.
Q. Are you aware whether the Food and Drug Administration has anything to say about the use of non-SPF tanning lotions for -- for outdoor use?
A. I'm not aware that they have anything for outdoor use. Other -- I mean, there are basic labeling, same in -- same that they would have for indoor use.
Q. How --
A. FDA controls all of our labeling.
Q. Do you submit label text to the FDA prior to utilizing it?
A. No.
Q. They just have regulatory over what's

on the labels?
A. Yes.
Q. Has the FDA ever asked you or required -- when I say "you," I mean Australian Gold. I'm sure they have no personal issues with you. Has they -- have they ever asked Australian Gold to make a change to labeling?
A. Yes.
Q. Can you remember what happened -- what -- what the facts were in that case?
A. The -- the indoor tanning products contain different types of oils, nutrients, amino acids, different things. The FDA determined that tyrosine, which is an amino acid.
Q. Do you want to spell that for the reporter and for the lawyers?
A. T-Y-R-O-S-I-N-E. T-Y-R-O-S-I-N-E.
Q. Tyrosine.
A. Is an amino acid that stimulates melanin, which is responsible for giving you the color of the tan on your skin. And if you put on the label, it was an accelerator and had tyrosine in the product, they

determined that that was now a drug and changed the structure of the skin. So you either had to take accelerator off the label or take tyrosine out of the product.
Q. Are you saying that your understanding of what the FDA was saying was you can keep the product the same, if you like; if you advertise it differently, we won't regulate it as a drug?
A. (Nodding.)
Q. That was a "yes," correct?
A. Yes, yes. If you say that it accelerates the tanning process, it's a drug. If you --
Q. Are any Australian Gold products regulated as drugs?
A. SPFs are over-the-counter drugs, yes.
Q. SPFs. So how does that change the way they're sold, or does it?
A. I don't believe it changes how they're sold.
Q. What does it mean to Australian Gold then for a product to be regulated by the FDA as opposed to not -- as a drug as opposed to

A. As a drug?
Q. -- not being regulated as a drug?
A. Our over-the-counter SPF products, they have specific good manufacturing processes that have to be met. We have to do testing. We have to have stability testing. We have to have in vitro testing as far as verifying that the SPFs are what they pro -- on the product label. We have to meet all the CTFA labeling guidelines and we have to keep samples at the manufacturing facility.
Q. Does the FDA have any regulations that you're aware of in your role as president and chief executive officer of Australian Gold that mandates or guides Australian Gold as to how or to whom the SPF products are sold?
A. I don't understand.
Q. Does the S -- does -- does the fact that the FDA -- you -- you just described for me a few differences between a nondrug product and a drug product. I believe your testimony was that SPFs are regulated as over-the-counter drugs by the Food and Drug

Administration.

Does any of that regulation -- you -- and you -- you then mentioned a few things that are different between the nondrug and the drugs. In addition to what you've listed, does the FDA have any regulatory requirements regarding how or to whom the SPFs are sold?

MR. MATTHEWS: I'm going to object to the form of the question to the extent it calls for a legal conclusion.

You can answer the question based upon your understanding.

Q. On your operational understanding.

A. I believe that the FDA governs the product. I don't believe that they create marketing channels or anything as far as that's concerned, with the exception of actual drugs where you have to have a license to distribute. I've not read anything otherwise contrary to that.

Q. Do you know whether over-the-counter drug products are restricted as to the age to which -- the age of the user?

MR. MATTHEWS: I'll just show a

standing objection to the -- the line of questioning to the extent FDA regulations and rules and requirements call for a legal conclusion. That way I won't interrupt your question.

MR. COLEMAN: Sure. I appreciate that, and I -- I'll -- and I'll stipulate that we're absolutely not making any -- we -- receiving legal answers.

Q. But rather, based on your operational understanding and your executive duties, has -- has the issue -- let me ask a much broader question.

Is there any restriction on, even internally at Australian Gold, as to the age of persons who may buy any Australian Gold product?

A. The FDA monograph -- and it's not buy, but the FDA monographs requires us to put on SPF products that children under six months should not use it. It's not a buy. The FDA doesn't market -- I mean, it's not a marketing channel regulation, so it's labeling, ingredients, that type.

Q. Do you -- do you have any

understanding when you -- you've said a couple times that the FDA is not interested in marketing channels. Do you have any understanding as to --

MR. COLEMAN: Withdrawn.

Q. Now, I'm going to go back and ask you a little bit more about Australian Gold as a company. Do you -- do you know when the company was founded?

A. ETS? The original company was founded in 1984.

Q. 1984. And do you know who the people were who started the company?

A. Trevor and Edna Gray.

THE COURT REPORTER: Trevor Gray and --

THE WITNESS: Edna Gray.

Q. Are those two people --

A. Yes.

Q. -- Trevor Gray and Edna Gray --

A. Yes.

Q. -- husband and wife?

A. Yes.

Q. Are they still involved in the company?

A. They are on the holding board. They're not involved in the day-to-day activities.

Q. Did you have any expertise or even acquaintance with the field of tanning at all before you took that first job as a sales associate?

A. Other than having tanned before, no.

Q. What -- what is ATS?

A. ATS is another subsidiary that was set up originally for -- I believe a venture Trevor was doing with RCA, a local electronics company. It was a telemarket -- it was a marketing firm. At one time then we -- after that was finished, didn't -- didn't work out, ATS purchased Swedish Beauty from Fokey Johanson. It was set up as a separate company at that point in time.

Q. Was Carribean Gold also a privately owned line that was purchased, or was that developed internally?

A. Developed internally.

Q. When -- when did that take place?

A. I'm estimating -- I don't know the exact date. I would estimate about 1990.

not in evidence. How do -- what the -- what does the distributor do?
A. He works with the salon, provides education, training, finds out what type of products they want to sell, what market they're in, how best to get their -- you know, increase their sales. He works with providing the products to them when they need it.
Q. Okay. That's on the --
A. Do --
Q. -- the -- on the salon end?
A. Right.
Q. How does the distributor -- what is the range of interactions between the distributor and Australian Gold?
A. In --
Q. I'll give you a sense -- I don't want to testify for you, but I -- I'm looking for they -- we sell them our stuff, we ship it there, it stays in our warehouse or -- or, you know, how does it work?
How does the stuff get from -- where -- where is this -- where is Australian Gold -- where are Australian Gold products

manufactured, first of all?
A. At V Pack in Chicago.
THE COURT REPORTER: I'm sorry. Say that again.
THE WITNESS: V Pack.
Q. What is V Pack?
A. Our contract manufacturer.
Q. This one manufacturer in Chicago manufactures all the lines?
A. Currently, yes.
Q. Have there been times when there have been other manufacturers?
A. Yes.
Q. How recently ago was that?
A. Three years ago we had a local.
Q. In Indianapolis?
A. Uh-huh.
Q. Okay. Indianapolis. Why the change?
A. The -- the -- think of the right word. The owner passed away. This -- people he had under him could not support our needs, so.
Q. Has it always been the case there has been -- that there has been a single manufacturer for all your products at a time?

A. I believe so.
Q. Are those the only two manufacturers, the one in Indianapolis and then V Pack, that you're familiar with?
A. That manu -- actually manufacture the product, yes.
Q. Does Australian Gold provide them with formulas and specifications?
A. Yes.
Q. What kind of -- in a general sense, what kind of quality maintenance is there to ensure that specifications are met?
A. We do random checks with the products. We keep stability test on file from them.
Q. How many people work for Australian Gold?
A. Eighty-eight.
Q. Are they all here in Indianapolis?
A. No.
Q. Where else are they?
A. We have an office in Florida.
Q. How many people are in Florida?
A. I believe nine.
Q. What happens in Florida that doesn't

happen here, besides the sun shining?
A. They support the SPF line, the outdoor line, that's just sold in Florida and some beach areas.
Q. So there are approximately 80 people in Indianapolis?
A. Yes.
Q. Are the people who monitor the manufacturing quality members of your full-time staff?
A. Yes.
Q. Are there chemists on your staff?
A. We have a contract chemist that's not on our staff.
Q. But is it the case that you use that person on a consultant basis?
A. Yes.
Q. Does that person help with formulations?
A. Yes.
Q. Who on your staff has key res -- who is the main person who has responsibility for safety issues?
A. Safety issues?
Q. Relating to the use of Australian

Gold products.
A. Ultimately me.
Q. Understood. Is there a person to whom you designate that portfolio, however, on a regular basis?
A. Different lines from a label standpoint would have different creative people working on them that I sign off on.
Q. Okay. Does Australian Gold employ anyone on a full-time basis out of the 88 who has responsibility only for safety?
A. No.
Q. Is it the case that each distributor of Australian Gold enters into a written contract with Australian Gold?
A. Yes.
Q. Are they all the same, the contracts?
A. I believe so with the exception of the dates and --
Q. Of course. Are there -- have there been in -- and you -- since you've been -- let me take a step back. Before you became president -- I'll just say "president" so we don't have try to give your title every time I describe your job.

Since you've been president, has there a -- have there been changes in the terms of the distribution agreements that are used?
A. Yes.
Q. Do you know what kind of changes those have been?
A. Yes.
Q. Can you tell me which -- which ones you might remember?
A. I don't -- I don't know what line it is or -- but there's a transfer of ownership. The --
Q. Of the distributorship?
A. Uh-huh.
Q. This new clause permits it or forbids it or regulates it or which?
A. We -- we must approve it or they no longer can be the distributor.
Q. Do these contracts have terms in them that control to whom distributors may sell Australian Gold products?
A. I believe you have a copy of it, but there are sections on the resale.
Q. And it's your testimony that these

sections that govern resale apply to all the contracts with the distributors; is that correct? In other words, there is -- there are no distributors who have contracts --
A. There's no other contract that says otherwise.
Q. Do you know whether those terms have changed during the time that you have been aware of the distributorship contracts?
A. No, not that I'm aware of.
Q. Can you buy Australian Gold on the Internet, Australian Gold products?
A. What do you mean "can you"?
Q. Can -- what if I don't want to go to a tanning salon, if I just want it in the comfort of my home, order some on the Internet. Can I buy some?
A. We don't authorize it.
Q. Is it possible to buy from an unauthorized source on the Internet?
A. Possible.
Q. Well, it is --
A. I mean --
Q. It is a yes or no question. So if you say no, we can all go home.

MR. MATTHEWS: I think your clients have to answer that question. Then we can go home.
MR. COLEMAN: My clients -- my -- that's one of the first allegations in the complaint is that we sell it.
Q. In fact, it's true that some people sell Australian Gold on the Internet, isn't it?
A. Yes.
Q. Are distributors prohibited in their agreements from selling to persons who are selling Australian Gold products on the Internet?
MR. MATTHEWS: I'm going to object to the form of the que -- question, because the document -- the -- the contract speaks for itself.
To the extent, you have a memory as to what the contract says, you can answer the question the best you can. Otherwise you can look at the agreement.
MR. COLEMAN: And your -- your objection is noted.
Q. You can answer the question. Are you

A. Again, it's in the contract there. Some of the items are they have to have a catalog. They have to be abl -- it's to be resold into a salon environment where they have tanning as the majority of their business. They have to have an 800 number. They have to work with us on training of both their staff and the salons that they sell to. There's a list of items there.
Q. Okay. So you're talking to me about contractual requirements. Are there other qualifications that are not in the contract that a company has to meet before you'll even give them a contract?
In other words, if I call up and I say, look, I've never been in this business before, but I heard I can make some money off it and I think I -- I think I know how I can sell the stuff. Give me your contract. I want to -- I want to be a distributor, would you require anything else from me in terms of a -- the demonstration of capitalization or a letter of credit? Any other kinds of prequalifying sort of criteria?

A. That's a good question, because in the last five years, we've not added anyone new to -- outside of the business, so we -- we -- I don't -- I don't really -- I don't think that I have an --
Q. Okay.
A. -- outline for new business.
Q. Is it the case then that two distributors could be operating in next door locations and competing with each other as distributors?
A. It's possible.
Q. To your knowledge, is there any situation where there are distributors that are located within a couple of miles of each other geographically?
A. Yes.
Q. Would those be in the more saturated markets?
A. No.
Q. Oh, it sounds like -- it sounds like I hit a good one there. However, it's not really germane to our case.
Do you remember -- and so -- so the -- this AET -- was it AETS?

A. Yes.
Q. Funny how much it sounds like a combination of your --
A. Funny.
Q. -- two businesses --
An AETS, when -- when were they terminated?
A. I believe between 2002 and 2004, one of -- in that time period.
Q. Were they implicated in the Hatfield litigation?
A. I believe so.
MR. MATTHEWS: For the record, they were convicted.
THE WITNESS: AETS was?
MR. COLEMAN: Convicted for what?
MR. MATTHEWS: Just giving you a hard time, Ron.
MR. COLEMAN: Off the record for a second, please.
(At this time a discussion was held off the record.)
Q. Now, these subdistributors that you refer to, are they subject to the same contractual restrictions in terms of whom

they can sell to?
A. Yes.
Q. Have you added -- has Australian Gold added any subdistributors since the time that you have been aware of it?
A. I would have to look at the list. I couldn't --
Q. You don't have an -- a clear recollection of, then. I actually meant to get a better understanding of this. Where -- do distributors maintain a physical stock of product? Is that one of their --
A. Yes.
Q. -- roles? Do distributors vary widely in how often they order product or does each dist -- di -- distributor typically order three or four times a year -- is there a wide range?
A. Distributors have different business models.
Q. Different business models. So in situations where you have a subdistributor, do the distributors mostly function as -- let me re -- let me rephrase it.
Why wouldn't you just have

Q. -- we'll -- maybe we'll come back to that.
Do -- does Australian Gold require its distributors to enter into contracts -- let's put the chains aside now. In terms of the regular distributors, are they required by Australian Gold to enter into contracts with the salons that govern whom the salons sell to?
MR. MATTHEWS: I'm sorry. Could you -- could you restate that? I lost you there.
MR. COLEMAN: Sure.
Q. Does Australian Gold require its distributors to enter into contracts with salons that govern how or to whom the salons sell Australian Gold products?
A. We don't require contracts.
Q. Are you aware of any contracts such as the one I just described that do that?
A. In tanning?
Q. Yes.
A. I'm not aware of a contract.
Q. You're not -- so does Australian Gold have any idea what people do with tanning

lotion once they buy it from the salon?
A. We know what the product is designed to do.
Q. I'm going to ask you to see if you can actually answer the question that I asked, which is slightly different than the one you answered.
Do you want me to have it read back?
A. Yes
MR. COLEMAN: Can you please read back the last question?
(The Court Reporter read back the last preceding question, as set forth herein above.)
A. It's our assumption that they take it into the room, put it on their body, get into a tanning bed.
Q. Is it your assumption that they don't use it at home?
A. They would use moisturizers at home.
Q. What if they have a tanning bed at home?
A. They would use the product before getting into the bed.
Q. Does Australian Gold sell its

products to individuals if they have a tanning bed themselves?
A. If they order the beds through ETS, yes.
Q. If they order the beds through ETS, then how would you go about determining that they had a -- an ET -- ETS bed once they -- once they put in their orders?
A. There are several questions that someone may ask them as far as the serial number, lamps in the bed.
Q. Once they buy that bed, is there any ongoing monitoring to -- to see if they still own the bed?
A. Not physically, no.
Q. Is it by something other than a physical method?
A. We would ask for the serial number on the bed or -- I mean, we don't go into the homes and make sure it's still there.
Q. So they could be giving you a serial number for a bed that they bought and then sold on eBay the next day, right?
A. Yes.
Q. Is that also true regarding -- I'll

rephrase. Does Australian Gold do any monitoring to confirm that salon purchasers are still -- are still operating as salons with tanning beds in them?
A. We do store checks.
Q. When you say "we," do you mean the distributor or do you mean Australian Gold?
A. Could be both.
Q. Does Australian Gold do them itself?
A. That's we've got -- we go out to salons periodically.
Q. Who goes out to salons? What -- who are the staff members who do that?
A. I've been out to salons. Our sales staff does in-salon training. Our marketing people do product testing.
MR. COLEMAN: Off for a second. Meanwhile, you can mark this as Exhibit 2, please.
(The Court Reporter marked a document for identification as Exhibit No. 2.)
Q. Do you recognize what has been marked as Exhibit 2?
A. Yes.
Q. Can you des

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MR. MATTHEWS: And --
MR. COLEMAN: Oh, I'm sorry. Wait a minute.
MR. MATTHEWS: Ron, for the record, we have -- we have marked Exhibit 2 as attorneys' eyes only, and I would suggest that pursuant to the terms of our protective order, when we get into documents that are attorneys' eyes only or questions that involve specific distributors which we've said we do not want to be disclosed to your clients for the same reasons they don't want to disclose to Australian Gold, that we mark that portion of the depo -- deposition as attorneys' eyes only and I would suggest binding it separately so you can share it with your client.
MR. COLEMAN: Agreed 100 percent.
MR. MATTHEWS: Okay. So let the record show that this --
A. The Planet Beach --
MR. MATTHEWS: -- this -- this portion of the record be designated attorneys' eyes only and the por -- and also go back and ask that the portion of the

record designating the chain salons also be designated attorneys' eyes only where we disclose the identity of those chain salons which I won't repeat again. Agreed?
MR. COLEMAN: Agreed.
MR. MATTHEWS: Okay.
Q. Okay. Can you describe what we've marked as Exhibit 2?
A. This is our distribution contract.
Q. Can I ask you to please turn to page 3?
MR. COLEMAN: For the record, this is the con -- this is the document which has been designated with the Document Control No. AG0005495 continuing on through 5516. So at the top of page 3, are these the clauses in this contract which govern Internet sales? That would be paragraph 1.1(E)(I)(a) and (b).
MR. MATTHEWS: I'm just going to object to the form of the question in that it did -- does not have a time frame or this contract defines a certain period of time.
Q. Well, is this the contract that's in use now, to your knowledge?
A. Yes, this expires this year.

THE COURT REPORTER: I'm sorry. I didn't hear it.
THE WITNESS: Yes, this contract expires in 2006.
Q. Okay. Let's actually take a step back and look at the second page, D, Customers of Distributor. In subparagraph (I), it's really 1, it's Roman I, it says, "Customer means only a person (a) whose primary business activity is operating a tanning salon or hair and beauty care salon."
Does a customer who operates a hair salon have the right to purchase from -- directly from your distributors under this contract, the way you understand it?
A. If they also offer indoor tanning instruction and tanning equipment.
Q. So (b) and), in other words, they have to be one of those things and offer approved tanning -- indoor tanning and instruction on the use of products, in other words, of ETS or Australian Gold products, as an on-premises service and who obtains training and instructions -- and instruction, etc. So in other words, a customer has to

meet all three of those criteria; that's correct?
A. Yes.
Q. Now, what does approved indoor tanning and instruction on use of the products? Who approves -- what does -- what does approved indoor tanning mean? Am I reading that correctly? Who offers approved indoor tanning and instruction? What's approved indoor tanning?
A. It would be -- my interpretation would be the difference between if we went to someplace that had a bed that wasn't plugged in and didn't work, which has happened, and we go to a salon that is selling a service of tanning with a tanning bed that has lamps in it that works and is providing UV light to the customer.
Q. And the instruction -- this -- this customer has to also provide instruction on the use of products; is that correct?
A. Yes, it has to be available.
THE COURT REPORTER: I'm sorry. Yes, it --
THE WITNESS: Yes, it has to be

A. Yes, the consultant has to be available with the information.
Q. Is the distributor required to --
MR. COLEMAN: Withdrawn.
Q. How does a distributor know, based on how you enforce the terms of this contract, whether or not the -- the employees of a tanning salon are qualified to give instruction in the use of the products?
A. Can you reword that, because qualified is -- we don't say they have to be qualified to do it. It's kind of --
Q. It's kind of what?
A. We tell them who -- we tell them who -- who -- where the peo -- where the lotions can be sold. We provide the tanning training information. We give that information to the salon owners to provide that information to the customers.
Q. Is it --
A. There's not a test.
Q. It's not -- there's no test; is that what you're saying?
A. Prior to them selling it.
Q. Is there a test for them to maintain

their -- when we said -- when you said "them selling it," you mean the salon owners, right, or do you mean the distributors?
A. Before that -- you said the distributors have to be -- to qualify their customers.
Q. Oh, that's what I --
A. There isn't a test that qualifies them.
Q. You're saying they don't have to qualify?
A. Well, they have to qualify them to these specifications, but --
Q. Okay. So let's focus on this word "instruction." And this is with -- with the continuing objection regarding the matter of contract interpretation. But because -- in mind -- but because you have the responsibility to enforce this contract in your job as the president of Australian Gold, and because to a large extent, this has become an issue in this case, I'm going to ask you to -- to -- to really try to get a sense of what Australian Gold's expectations are under this contract about instruction by

what is defined in this contract as a customer. A customer means a salon, correct?
A. A salon offering tanning.
Q. Right. And we've said that the approved indoor tanning, that refers to -- it has to be a bona fide operation, not they bought a bed in 1974 and they use it as a shelf in the back; it has to be the real deal.
A. Correct.
Q. Okay. The question is the "instruction." Is -- I think you have testified that Australian Gold itself offers instruction on the use of the products to tanning salons; is that correct?
A. Yes.
Q. Do they have to take it in order to be qualified as customers? They have -- do they have to take that instruction from Australian Gold?
A. There's different levels of instruction. It could be we provide written materials and it could be over the phone that the distributors are talking to them. It could be that they attend a seminar. So

there's -- instruction is -- there's different levels.
Q. Actually, section -- Sub -- Subsection C does say, doesn't it, that the customer must obtain training and instruction on matters relating to the use of the products from ETS or one of ETS's distributors; that's correct, right?
A. I think so. Like I said, it could be over the phone. It doesn't have to be in person.
Q. If a -- if a consumer were to call up Australian Gold and ask for instruction on use of one of its products, would you refer that person to a salon or would you -- or -- or would Australian Gold provide that information?
A. It depends on the question.
Q. What's an example of -- of how that might depend on the question?
A. If someone called in and -- and I don't know, because this does not usually happen. The consumer --
Q. Well, is there a consumer -- okay. Let -- let me ask a more focused question.

Is there a consumer information phone number for Australian Gold?
A. There's an 800 number on the products.
Q. On the products?
A. I believe. I don't have a label in front of me. I know our Web site is located on the labels.
Q. And where does that phone ring?
A. Into our office.
Q. Here in Indianapolis?
A. Uh-huh.
Q. Is there a phone bank or something where those phones are picked up, or does it go through the marketing department? Do you know literally within the building? Does it go to a switchboard?
A. It goes through the sales department.
MR. COLEMAN: Please mark this as Exhibit 3.
(The Court Reporter marked a document for identification as Exhibit No. 3.)
Q. I ask you to -- to take a look at Exhibit 3. You made some reference to -- to training manuals. Is this the sort of

manual that would be given to a -- an end -- to a -- to a salon customer by ETS or would this go only to distributors or both?
A. This could go to salons or distributors.
Q. Does every salon that sells Australian Gold products get one of these?
A. It's our --
MR. MATTHEWS: I'm going to -- I'm going to object to the form of the question to the extent it calls for speculation.
You may answer.
A. It -- it's our goal that they do, yes.
Q. The -- I -- I'm going to deduce from your answer and from the objection that you don't know if they do; is that correct?
A. Not every salon.
Q. Does every distributor get it?
A. Yes.
Q. Are there -- in the year 2004, would this have been the only training manual? This is -- let me just make it clear that this is the document that is indexed with the Document Control No. AG0004505 and

continues on until 0004568, the AG indicating that it was produced by your attorneys in this litigation. The reason I'm saying that is so that you can take some comfort in knowing that this came from Australian Gold; it wasn't downloaded off the Internet or something.
So on the premise without requiring you to go through each page and swearing under oath you recognize the manual by heart, on the premise this is what it appears to be. I'll now ask the question, is this the training ma -- manual for Australian Gold products for 2004?
A. For Australian Gold products only, yes.
Q. All right. Okay. Was there another training manual for Australian Gold products in the year 2004 besides this one?
A. There were training materials.
Q. There would be other training materials?
A. (Nodding.)
Q. What would that consist of?
A. We have point of purchase charts that

come -- walk them through the different ingredients, different levels of bronzers, different levels of tingle that could affect their skin type and create a negative experience for them. There's --
Q. Can I stop you there?
A. Uh-huh.
Q. What's a negative experience?
A. Not a positive. I mean, they could --
Q. Using this deposition as a baseline for a negative and positive experiences is kind of being where the two meets.
MR. COLEMAN: Now, I'll withdraw that.
Q. When you say "negative experience," what kind of experience are you talking about? Is it -- is it a danger to their health?
A. Not a danger to their health. They could -- not prepared, they could have a skin reaction.
Q. How long does the reaction last?
A. Depends on their skin type.
Q. What's the range of possibilities?

A. An hour to two days, you get people --
Q. And -- and what's the nature of that reaction?
A. Tingling sensation, welts on their skin, very uncomfortable.
Q. Is -- there's been some testimony in this case about tingle products, so maybe we can take a little detour and talk a little bit about tingle products since you -- you brought up the topic.
Can you exp -- can you please explain what a tingle tanning product is? I'm sorry. I don't mean to ask you the specific names of what a product -- as a general rule, what is a -- what are the -- what is a tingling -- what is a tingle product?
A. It's a product that generally contains Benzyl Nicotinate or Methyl Nicotinate that --
THE COURT REPORTER: I'm sorry. The second one?
THE WITNESS: Methyl Nicotinate.
Q. And what does it -- what does this -- what do these che -- chemicals do?

A. It increases circulation. Gen -- generally --
Q. That's a good -- that's a good thing, isn't it, increasing circulation?
A. Depends on the level.
Q. So what are the issues? Is -- is there a difference between -- when -- when you're talking about skin types, does -- does the existence of a -- let's form -- question. What -- what is it based or a tanning base? Is that the term that I'm looking for?
A. Base tan.
Q. Okay. What is a base tan?
A. It's generally after someone has built up three to five sessions of tanning and their body has gotten used to the UV light and they're seeing a color change.
Q. Does the existence or the presence of a base tan have an effect on whether there will be a reaction to a tingle product?
A. It is one -- one part of it.
Q. What are the other parts?
A. Their actual skin type.
Q. So what does skin type mean?

A. Aller -- the -- whether their skin -- they have allergic reactions or different things.
Q. Okay. So we've put this Exhibit 3 in front of you. Is -- do you review the training manual before it is distributed?
A. Ycs.
MR. MATTHEWS: Is that with respect to her or Australian Gold, Ron?
Q. You personally.
A. (Nodding.)
Q. You do?
A. (Nodding.)
Q. I believe you nodded "yes."
A. Yes.
Q. Because you're -- you're undoubtedly more familiar with the training manual than I am, maybe you could direct me -- it's a yes or no question. If you can't, then you can't. Can you direct me to the section of the training manual that deals with safety issues, if there is one? Is there a section in the training manual that deals exclusively with safety issues?
A. There's not a safety section.

Q. Where would safety information be found in the training manual?
A. What do you mean by "safety"?
Q. Is there a safety issue implicated in the sale of tanning lotion?
A. To the extent that someone could get hurt -- or not hurt, but could get a reaction, yes. We discuss it in the tingle when we go over the tingle areas.
Q. All right. This is one of those one- or two-hour reactions you're talking about?
A. It could be a day -- two days.
Q. Have you heard about --
A. Two days.
Q. How did -- how did you learn -- have you heard about people having day long reactions to -- to --
A. Yes.
Q. -- to Australian Gold tingle products?
A. Yes.
Q. Have consumers complained about that?
A. I believe you have some information on consumer complaints.
Q. Are you personally aware of -- I

guess that's a yes. You are aware of consumer complaints about tingle products?
A. Yes.
Q. Were these products purchased from -- to your knowledge, were they purchased from unauthorized distributors?
A. I don't know without looking at them.
Q. Is it possible they were to -- that -- can a person have a bad reaction --
MR. COLEMAN: Withdrawn.
Q. Okay. You -- you actually just referred to a section here that would be -- be somewhat responsive. What page is that?
A. Six.
MR. MATTHEWS: Leslie, why don't you refer to the Australian Gold number at the bottom?
A. 4510.
Q. Okay.
THE COURT REPORTER: I'm sorry. Say that again.
THE WITNESS: 4510.
Q. And can you tell me what it is that you want -- you're looking at?
A. The seventh line up is the area where

it says tingle intensity. It's got a little flame. It says contains tingle and the product line reflects to each bottle, so when a customer con -- consultation is going on, if someone's new, they would focus on the products without any type of sun.
If they've been tanning for a while and feel that they have reached their tanning plateau and want something more, want that immediate reaction, want to see some color, they would go to more of a quarter or half type sun.
Someone that tans regularly that is very dark but still wants to see more color immediately when they get out of the bed would go to more of a three quarter or a full sun of tingle there so that they're not surprised by the reaction.
Q. Has Australian Gold ever been sued by anyone because of a reaction to a tingle product?
A. We have been involved in a case.
Q. What was that case?
A. The name?
Q. Let's start there.

A. Her first -- her last name was Soans. I don't know what her first name is.
THE COURT REPORTER: I'm sorry.
THE WITNESS: Soans.
Q. S-O-N-E-S?
A. S-O-A-N-S.
Q. And what was Australian Gold's involvement in that case?
A. We were the def -- a defendant. She also named a salon.
Q. And she was suing because of an adverse reaction that she had to -- to a tingle product?
A. Yes.
Q. And she had bought them at a salon?
A. Yes.
Q. Was that --
A. Which is why we need more training.
Q. You need more training with salons?
A. Continued training.
Q. Did the owner of that salon -- or the -- did the -- did that salon have a training issue that distinguished it from other salons in the -- in the Australian Gold network that you're aware of?

A. I don't know that that was asked.
Q. How was that case resolved?
A. We settled.
Q. Did you make a payment to the plaintiff?
A. Australian Gold personally?
Q. Australian Gold as a company.
A. Our insurance company settled it.
Q. Oh.
A. So we didn't pay it.
Q. Was that -- you -- do you know the jurisdiction where that litigation took place, what state that was in?
A. California.
Q. Was that in state court?
A. I don't know.
Q. Are you aware of any other litigation involving tingle products that involved --
A. Not that I believe got to litigation, no.
Q. Okay. Does the Food and Drug Administration regulate tingle products as an over-the-counter drug?
A. Not that I'm aware of.
Q. Are you aware of any rulemaking

activity or investigations by the FDA on the -- regarding the topic of tingle products?
A. Not that I'm aware of.
Q. Do you know if there's -- going back to Exhibit 3. Do you know if there's -- is there any other text in Exhibit 3 that addresses this issue of --
A. Of tingle?
Q. -- of the tingle?
MR. MATTHEWS: And I'll just instruct the witness to take her time and look through --
MR. COLEMAN: By all means.
MR. MATTHEWS: -- the document.
MR. COLEMAN: By the way, it's been an hour and a quarter. If you want to take a break, you can. We can -- I don't need one.
THE WITNESS: Okay. We can.
MR. COLEMAN: Let's do it.
(A short break was taken at this time.)
MR. COLEMAN: We can go back on.
Q. Okay. Have you had a chance to look at Exhibit 3 and -- and determine whether

there's any more tingle related information in terms of training?
A. I haven't reviewed the whole thing. Some -- some of the information, as we explained, StimuTan is an after-tan glow. They'll feel and see their tan working. I believe there's more in here.
Q. Did you say StimuTan?
A. Yes.
Q. Is that you what -- is that --
A. What we call our trade secret formulation blend. For example, in bronzing fire glaze which would probably have a --
THE COURT REPORTER: I'm sorry.
THE COURT REPORTER: Bronzing fire glaze.
Q. And that would be on what page?
A. 4521. It would have a full sun in the tingle line. It says, "Added tingle for those who are currently using tanning products for darker tanning results."
Q. On page 4521, there's a box on the kind of upper right that says, "Selling tip."
A. Uh-huh.
Q. It says, "For advanced tingle tanners

who are already using a tingle product." Is a selling tip the same thing as a safety warning?
A. A safety warning per se would be required by the FDA, so --
Q. Oh, is that a term of art, "safety warning"? Okay. I understood.
A. Warning statement, yeah.
Q. Okay.
A. So we wouldn't put --
Q. You wouldn't put that on any of the products?
A. Unless it required it.
Q. Does the information about the tingling sensation that you have referred to in your testimony, is -- is that something that someone could read on the label of the product?
A. Generally, there are tingle statements on the products.
Q. Were there any changes to the product labels after you settled that Soans case?
A. No, not that I'm aware of.
Q. Would there be a -- somewhere you -- is it -- is it possible that such a change

could have taken place and that you would not be aware of it?
A. We did not make any --
Q. Oh.
A. -- back changes. We've always put a caution statement on there for them to test a small area of their skin. On 4532, "Blazin'" for advanced tingle tanners who already use the tingle products.
THE COURT REPORTER: I'm sorry. Could you repeat that? 4532 --
THE WITNESS: Blazin'.
Q. That's a product name B-L-A-Z-I-N apostrophe?
A. Yes. And, again, it says, "It's for advanced tingle tanners who already use tingle products."
Q. That's in the selling tip box?
A. And in the feature and benefits.
Q. I'm sorry. I -- I don't see where it is found --
A. (Indicating.)
Q. Oh, "StimuTan tingle and reddening" -- so where it says in the upper right feature, "StimuTan tingle and reddening

factor and then the benefit, an immediate after-tan glow that allows tanner to feel and see their tan working immediately."
A. Correct.
Q. There isn't any cautionary language, right, it's just features and benefits?
A. Other than the other statement where it's -- "for advanced tingle tanners."
Q. In the selling tip box, correct?
A. Yes. There are several. Do I have to go over each one?
Q. No, not at all. I -- I -- that was representative and I appreciate that. As they say, the document speaks for itself. We can move on.
A. But there again, this is just a manual. When they sit through training, the verbal of how to test it -- test it on a small area -- tingle has over the years become more of a common ingredient. I mean, in 2000 it wasn't so common. Now it's a more common ingredient. We train them on how to use the tingle. We've worked to train them.
MR. COLEMAN: Can you please mark

Exhibit 4?
(The Court Reporter marked a document for identification as Exhibit No. 4.)
Q. Do you recognize Exhibit 4?
A. Yes.
Q. Can you please explain what it is?
A. This is a program brochure we send out. We give --
Q. Whom do you send it to?
A. We provide it to the distributors. We provide it to training. We provide it --
Q. I'm sorry. To train what?
A. In training.
Q. And in -- in training -- when you train distributors?
A. And salons.
Q. Do you know how many salons were trained by Australian Gold -- Australian Gold directly in 2005?
A. I don't know the number off the top of my head. Tens of thousands.
THE COURT REPORTER: I'm sorry.
Q. Did you say tens of thousands? And when you say "trained," that encompasses what?

A. A training session on our tanning products, ingredients, sales techniques.
Q. So this would be given out during one of those training sessions?
A. It could have been, yes.
Q. Not necessarily every one?
A. Or other places.
Q. And what exactly is Exhibit -- I mean, I -- I mean, what -- what -- what -- what -- what's the nature of this program?
A. It provides incentives to salons to promote our products in their salon.
Q. Are there any incentives provided to salons to get safety training specifically?
A. From a regulation standpoint?
Q. No, from an internal ETS or Australian Gold standpoint.
A. As far -- like a safety training class?
Q. Yeah.
A. We don't offer a safety training class.
Q. Is this a co-op advertising program?
A. Yes, and SPIFF.
Q. And SPIFF.

A. I believe SPIFFs are in here.
Q. And a SPIFF is?
A. Certain products -- if they purchase and sell certain products in their salons during certain points of the year, they get, maybe, a quarter bottle or something that they can offer in return to their employees.
Q. Is that a way to kind of try to smooth out the sales cycles for those products?
A. Yes. Marketing programs.
Q. Let's go back to Exhibit 2, please. On top --
MR. MATTHEWS: Ron, can I stop you before you ask your questions? We never designated when we were off the confidential portions. I don't know how we want to do this. I want --
MR. COLEMAN: She just asked me that when we were off the record.
MR. MATTHEWS: Okay. I'm sorry.
MR. COLEMAN: That's okay. I mean, obviously -- but my understanding was that during the -- let's go off the record for a second.

is prepared to take action against you."
Next paragraph. "ETS considers this matter to be serious. Please do not take this letter lightly as your failure to comply will make litigation against you imminent."
Do you still -- do you still believe that this is a request?
A. If you want to use the word "demand." I'm just -- it doesn't say demand.
Q. Who is William Pipp?
A. He was the vice president of sales for Australian Gold, he's current -- for ETS. He's currently the president of ETS on the equipment side -- or the CEO. I'm sorry. CEO of ETS.
Q. I'm -- I'm referring now, of course, to the -- the recipients of these cc's on here. Who is Tracy Ring?
A. She is our national sales manager.
Q. And who is Susan Higgins?
A. The paralegal for Ice Miller.
Q. Were you copied on this letter?
A. No.
Q. At the time this was written, Mr. Pipp had a different post than his present

post with ETS; is that what you testified?
A. Yes.
Q. He -- at that time he was --
A. Vice president of sales.
Q. Did he have responsibility for the enforcement issues in connection with this sort of -- this sort of request letter?
A. Yes.
Q. Do you know whether at the time this letter was written -- well, let me first ask you. Would this letter have been reviewed by Mr. Pipp or someone else perhaps who is not on that list prior to being sent?
A. I don't know. I wasn't involved in the process.
Q. As a matter of -- of corporate policy, though, does Ice Miller have the authority to send these sort of cease and desist letters out without --
A. No.
Q. That's a no? So is it fair to say, then, that someone -- someone at ETS would have had -- would have looked at -- would have looked this over before it went out?
A. Yes.

Q. Paragraph 2 says in the last -- last sentence, "Our agreements" -- well, I -- I guess that's too much out of context. Let me read the previous sentence. "ETS sells the Products directly to tanning salons for resale to consumers in connection with their delivery of on-site tanning services and distributors for resale of such tanning salons. Our agreements expressly prohibit the sale of the Products through Web site remarketers such as yourself."
Do you have any reason to believe that my client -- I'm going to use the term "my client" in the singular here. It's understood that I'm referring to all my clients in this litigation. Do you have any reason to believe that, prior to receiving this letter, that my client was aware of what your agreements with distributors provided?
THE WITNESS: Can you read that back?
(The Court Reporter read back the last preceding question, as set forth herein above.)
A. I don't know if any other

communication occurred with your client before this, but.
Q. In other words, from dire -- whe -- whether it occurred from Ice Miller or directly from Australian Gold?
A. (Nodding.)
Q. That's a "yes"?
A. Right, I don't -- don't think so.
THE COURT REPORTER: --
THE WITNESS: I don't think so.
Q. I'm sorry. I -- I -- to be fair, I wasn't really asking whether or not it had done, because that would be like a hide the ball situation. I -- you don't know what I've got here. I'm going to represent to you -- I think -- I think that Mr. Matthews will agree.
This appears to be the first letter that went from you or your -- your counsel to my -- to my clients. So if that -- given that that appears to be the case, do you have any other reason to believe that -- that my client would have known what the distribution agreement between the distributors and Australian Gold requires?

A. Not prior to that point.
MR. COLEMAN: Please mark this as Exhibit 7.
(The Court Reporter marked a document for identification as Exhibit No. 7.)
Q. Have you seen Exhibit 7 before?
A. Yes.
Q. At the bottom of Exhibit 7, which just for the record I'll clarify, is a letter from my office to Ice Miller in response to the previous exhibit, the carryover paragraph at the bottom of page 1 says in the second sentence, "Specifically, please advise us of support for the proposition the one who purchases merchandise at one or more retail locations may be subject to liability for tortious interference with contract for selling that merchandise to others, based on a contract between a retailer and a third party."
Now, I'm not going to ask you to give me a legal authority for that. Would be particularly a unfair question. But what I am going to ask you is whether it's your understanding that a retailer -- that a

person who purchases Australian Gold merchandise from a retailer is bound in any way by the distribution agreement.
MR. MATTHEWS: To the extent, it calls for a legal conclusion, I object. You can answer as to your understanding.
MR. COLEMAN: Please reread the question.
(The Court Reporter read back the last preceding question, as set forth herein above.)
A. No.
Q. No, they are not bound?
A. Our agreement is with the distributor.
Q. Your what's with the distributor?
A. You asked if they -- they're bound by our agreement. Our agreement is with our distributor to promote to the salons.
Q. Was there any -- any -- was there any point during the period between the first cease and desist letter, which was Exhibit 6, and the filing of this litigation where there were discussions among -- I'm not asking for anything that involved attorney-client

privilege -- where there were discussions among the executives, including yourself, at Australian Gold about settling or -- or finding someway to accommodate the sales by my clients of Australian Gold products on the Internet?
MR. MATTHEWS: Need to ask you to rephrase it. I'm not sure I understood the -- the question, Ron.
Q. Between the time that the -- actually, let me ask a better question. Was there any period during which Australian Gold contemplated the possibility of finding a creative economic solution that would permit my client to continue in business selling Australian Gold merchandise?
MR. MATTHEWS: On the Internet?
MR. COLEMAN: Yes.
A. Not that I'm personally aware of.
MR. COLEMAN: Will you please mark this as Exhibit 8?
(The Court Reporter marked a document for identification as Exhibit No. 8.)
Q. Please take an opportunity to look at it.

(Witness reviewing document.)
Q. Does it that -- does Exhibit 8 -- did anybody refresh your recollection as to whether there was any consideration of finding a way to avoid litigation with Mr. -- with -- with our clients?
Well, let me ask you a question. You're thinking hard. Maybe we'll come back to that question.
Who is Dan -- is it Shaffer or Shaffer?
A. Shaffer.
Q. Who is Dan Shaffer?
A. He was -- he put our Internet sites up. He -- I don't know what --
Q. Was he --
A. -- his title was.
Q. Was he your Web master?
A. I don't know if he was master, but he did our Webs.
Q. Was -- was he in-house?
A. Yes.
Q. And who is Wendy Schwartz?
A. She was our equipment marketing

-- that's what it states?
A. Yes.
Q. And the date of that letter is what?
A. January 2004, 28th.
Q. Did my client come forward and make a full and complete disclosure as to where it was purchasing the Australian Gold and Swedish Beauty tanning lotions?
A. I don't believe so.
Q. So it, maybe, really was a request. In fact, ETS, Inc. did not sue my clients following this letter or at any other time until we filed our complaint first; is that correct?
A. Yes, you filed your suit against us.
Q. Is that because Ice -- I'm sorry. Is that because Australian Gold had no actual proof that my client was purchasing its products from distributors?
A. From my recollection, it was because we were in the middle of an appeal on the Hatfield case and we have limited resources and budgets and we had to pick our fights at that point in time.
MR. COLEMAN: Exhibit 10.

(The Court Reporter marked a document for identification as Exhibit No. 10.)
Q. Have you ever seen Exhibit 10 before?
A. Yes, I believe it was in the file. Yes, I believe so. It's in the files.
Q. In fact, Exhibit 10 is a letter from my office to Ice Miller dated January 29, 2004, in response to the previous exhibit. In the second paragraph towards the middle the letter says, "If your client believes it has some bona fide reason to think that our client is lying, we would like to know what it is; our client will readily rebut it without recourse to the courts." This was in response, I'll represent to you, to the assertion in the previous correspondence that our client was purchasing from -- directly from a distributor.
Did you have such proof at the time that you could have provided in response to the January 29, 2000 -- in response to exhibit -- Exhibit 10? Did you have proof at the time this letter was written that Australian -- that that my client was purchasing tanning lotion from -- from anyone

other than a tanning salon?
A. I don't think I can answer that, because I wasn't involved in this at that point in time.
Q. When did you get involved in this?
A. May or June of 2004 when we started making the switch.
Q. What's the switch?
A. ETS and Australian Gold as two separate entities.
Q. Uh-huh. Who would know whether or not Australian Gold had proof that would suggest that our client was purchasing merchandise directly from distributors since you have testified that you would not know?
A. I don't -- I don't know off the top of my head.
Q. But would it be one of the people who was copied on Exhibit 9? Would William Pipp know that?
MR. MATTHEWS: Objection to the form of the question.
MR. COLEMAN: What's the form objection?
MR. MATTHEWS: Calls for speculation.

How does she know what William Pipp --
MR. COLEMAN: Because she is the 30(b)(6) designee, she --
MR. MATTHEWS: I -- I don't see anywhere it says anything about communications between us. Has nothing to do with these -- these letters and -- and even your client in our efforts just -- with respect to your clients.
MR. COLEMAN: Okay.
MR. MATTHEWS: I mean, I'm not trying to be difficult, Ron, but that's --
MR. COLEMAN: No, that's -- that's a fair -- that's a fair point. We could set a -- we could certainly send interrogatories on -- on -- on the William Pipp mystery.
MR. MATTHEWS: Let -- let -- you know what? Let -- let me just -- let me do this. In proof -- and she may -- I don't want to testify for her, but if you're asking her why do they think your clients are buying from distributors, she can probably answer that question. When you say "proof," you're thinking do you have -- what did you have in your evidence file.

MR. COLEMAN: Okay. Well, that's a fair point. Maybe we'll come around to it that way at some point.
Q. But what I am trying to figure out is at the time that we requested in January of 2004, what did you have proof, with a small p, why did you think -- can -- we can rephrase it.
Why did Australian Gold think that my client must have been purchasing from a source other than -- than tanning salons? Do you know the answer to that question?
A. Generally speaking, I couldn't go into a salon today that had every product that's listed on that Web site. So to buy it from a salon, they don't carry every single product generally, and every single product is listed on there, so he's buying it from more than just -- in our opinion was buying it more than just one person.
Q. Do you know how many salons carry Australian Gold products in the New York area?
A. I could get the list. I don't know off the top of my head.

Q. Would it be more than ten?
A. Yes.
Q. Would it be more than 50?
A. At that point I don't know. I don't know how many in New York City.
Q. But it was your opinion that -- perhaps it remains your opinion; you'll tell me -- that anyone who carried that wide range of products could not have gone from salon to salon buying boxes of tanning lotion?
A. We find it -- thought -- thought it unlikely.
Q. Why don't you -- do you know why Australian Gold or its attorneys never wrote back and said, "Mr. Coleman, here is why we think that. We think it's more product of a broader range of merchandise than could conceivably have been purchased from a single or even a number of tanning salons," do you know why no such letter was ever sent?
A. Here again, I wasn't involved. I can't answer that.
MR. COLEMAN: Exhibit 11.
(The Court Reporter marked a document for identification as Exhibit No. 11.)

Q. May we assume you have seen Exhibit 11 before?
A. Yes, you may.
Q. This letter is a letter from you, isn't it?
A. Yes.
Q. What was it that happened between early 2004 and the date of this letter February 22nd, 2005, that got Body Source back onto your radar?
A. There are several things. A few of them are -- of which are I became president of Australian Gold and part of that process we analyzed our business, we were looking at our strengths, weaknesses, opportunities and threats, and as part of that, the integrity of Australian Gold with regard to Internet came up and we decided to budget a portion of our revenues to relook at the whole Internet process -- the Internet sales process more aggressively.
Q. Was this letter -- was this letter vetted by counsel before it was sent?
MR. MATTHEWS: Objection. Invades

the attorney-client privilege. I'll instruct her not to answer.
Q. The previous letters, Exhibits 9 and 6, refer to trademark infringement. Exhibit 11 does not refer to trademark infringement. Why is that?
A. I -- probably because we didn't have the attorneys -- I mean, we just were doing this on our own trying to work through the process.
Q. What does it mean that Australian Gold would -- starting the middle of the first sentence. I don't think I'm mischaracterizing it. "Will take whatever steps that are necessary to ensure that our products remain a premium product in the tanning industry." What do the -- what does the word "remain a premium product" mean?
A. To me, the -- the ultimate quality products that are sold in salons, that they aren't flea market quality products, they're the top of the line --
Q. Does --
A. -- from an integrity.
Q. Does the quality of the product

differ depending on where it's purchased?
A. It's the reputation. If you can buy a Rolls Royce at K-Mart, it's not the same as buying a Rolls Roycc at the Rolls Royce dealer.
Q. Is it against the law to buy a Rolls Royce at K-Mart?
A. Not a law --
MR. MATTHEWS: Objection. For the record, it should be.
MR. COLEMAN: But then they can close for the rest of the day. I think you can buy one on eBay, by the way.
Q. You make reference there to the -- a $5.23 million judgment that Australian Gold obtained. Is that the Hatfield case?
A. Yes.
Q. The Hatfields actually were purchasing directly from distributors, weren't they?
A. I don't know everywhere they were buying from.
Q. I wasn't -- didn't ask you that. They did actually buy directly from distributors, didn't they?
A. Yes. But they also -- I know Tan

Company was contacted by them. That's a salon. So I don't know everywhere they purchased from.
Q. On the bottom of -- of the first page, it says, "If you choose to ignore this letter, Australian Gold, Inc. will take action against you and seek actual and punitive damages as well as a permanent injunction against you and enjoining you from selling our products on eBay or Internet Web sites." Do you have any reason to believe that my client was selling merchandise on eBay?
A. I believe it's a general statement.
Q. Fair enough. And where it says in the last paragraph in the last sentence, "Otherwise, we will look forward to discovering the scope of your business through depositions and discovery in the lawsuit that we will file against you." It does say that, right?
A. Yes.
Q. Was it your intention to file a lawsuit against Australian Gold, in short order, if your demands were not met?

MR. MATTHEWS: You might want to rephrase that. You said against Australian Gold. Unless she wants to sue herself.
Q. Was it your intention to -- to file a lawsuit against my clients, in short order, if the demands in this letter were not met?
A. We were prepared, yes.
Q. What were you -- did you actually intend to do it? I'm sure with this able legal team at your disposal, you're always prepared, but were you -- or had you made the decision at the time this letter went out that absent a satisfactory response there would be a lawsuit?
MR. MATTHEWS: I'm -- I'm going to object to the extent that her decision involved att -- attorney-client privileged communications. Instruct her not to answer with respect to the advice she received from us. If she can do that without doing --
MR. COLEMAN: Right.
MR. MATTHEWS: -- so, she can answer the question.
Q. You -- you being the executive -- who decides whether or not a lawsuit is filed by

Australian Gold?
A. Ultimately me.
Q. Have you made the decision whether or not a lawsuit would be -- and this is a yes or no question. It could be no. Had you made the decision whether or not there would be a lawsuit when this -- if these -- the demands in this letter were not met?
A. It's probable. I don't recall the date, but, yes, it's probable.
Q. Would you have written it if you didn't mean it?
A. It was probable. I mean, I can't recall that date specifically, but probably.
Q. Was it your practice to make -- is it your practice to bluff?
A. No, we've been in lawsuits before, but.
Q. So if you wrote it -- does it -- does that refresh your recollection that since you do not bluff and since you did write it that you must have meant it?
A. Did I -- I mean, the lawsuit is very entailed, so --
Q. So you don't remember?

A. I'm just saying -- you asked if on that date it was my intention to file a lawsuit and I'm saying it's probable, but I don't know that I sat down with a lawyer and said I'm going to file a lawsuit today.
Q. Well, you signed it on that day, right?
A. Right.
Q. So can we assume that everything that appears above your signature is sincere?
A. You can assume so.
MR. COLEMAN: Exhibit 12.
(The Court Reporter marked a document for identification as Exhibit No. 12.)
Q. Did you have a chance to look at it? Do you know what Exhibit 12 is?
(Witness peruses document.)
A. Yes.
Q. In fact, this is Australian Gold's amended answer, defenses in this litigation. Did you review this before it was filed?
A. Yes.
Q. Let's go to page 5. I'll just note for the record that this is -- the style of -- of the way this pleading was prepared was

that both the allegation and the answer to the allegation is printed conveniently on each page of the answer. So it says regarding Allegation 15, which was from our complaint, "All the Tanning Products sold by plaintiff at the supplenet.com Web site are purchased by the plaintiff at retail tanning lotion" -- "retail tanning salons." And just because we haven't mentioned it before at this deposition, this Supplenet.com is the name of the Web site where our client does business, that's correct, right, as far as you understand it, Supplenet.com?
A. One of them, yes.
Q. So the answer is "Australian Gold denies that plaintiff purchases its products from a retail tanning salon based upon plaintiff's volume of business, but is without sufficient information or knowledge as to the remaining allegations contained in paragraph 15 of the Complaint and therefore denies the same."
Now, I understand that this is lawyer talk, but do you have any understanding having looked this over before it was filed,

first of all, what the re -- what the remaining allegations are referred to in the second half of that answer?
A. I don't believe I asked for a definition, no.
Q. Okay. So that makes you and me both. Let's go to Australian Gold denies. Is it -- this seems to be consistent with your earlier testimony that the volume of business was the basis for Australian Gold's belief that plaintiff purchased its products from a retail tanning salon. Would you say that's correct?
A. Volume --
Q. Oh, this refers --
A. Assortment, yes.
Q. Yes. Also this refer -- that's what I find a little bit interesting because in your testimony you told me that what struck you was the assortment that that -- that they carried the full line, and this seems to go to the -- to the volume of business done. Are they both correct as to what your understanding was before we got into discovery in this case?

Was it both the volume and the variety or -- or is it one -- is either your -- your recollection maybe not quite -- does this in anyway refresh your -- your understanding of -- of what it was that made you confident enough to deny this allegation in paragraph 15?
A. Can you read it one more time?
Q. No. I'll just rephrase it. It's a stinky question.
Was it the volume of sales or was it the variety of Australian Gold products available on the Supplenet.com Web site that made you believe that my clients could not have been purchasing their product from tanning salons?
A. The vari -- I mean, the -- the variety, the number of products is part of the volume of the products. It's a huge amount. I mean, that's -- that is --
Q. Okay. So --
A. -- distributor catalog.
Q. So you didn't really know how much product was really being sold?
A. Right.

Q. So it couldn't have been the volume in terms of warehouses full; in fact, you didn't know whether any actual sales at all were taking place on -- on the Supplenet.com, did you?
A. No.
Q. Were there other that's -- were there investigations that were being done -- I'm not -- I'm not interested in anything that was being done under the auspices of Ice Miller, but -- but outside of the sphere of the legal team, was your company investigating trying to find out whether or not there were -- whom -- whom my clients were buying from?
A. Yes.
Q. Do you remember what that investigation entailed?
A. We contacted distributors and looked for sales in different zip codes. We may have asked directly. I don't know each individual thing. We may have asked directly if they were selling to them.
Q. In fact, didn't you send out a memorandum or a letter to the distributors

targeting this area --
A. Uh-huh.
Q. -- specifically asking them whether or not they had sold to the SuppleNet or -- or Body Source?
A. Yes.
MR. COLEMAN: Exhibit 12.
MR. MATTHEWS: 13.
MR. COLEMAN: I'm sorry.
(The Court Reporter marked a document for identification as Exhibit No. 13.)
Q. Have you seen Exhibit 12 before?
A. Yes.
THE COURT REPORTER: 13.
MR. COLEMAN: I'm sorry. 13 it is.
THE WITNESS: 13.
Q. Did you get cooperation from the distributors that received this letter?
A. I believe so, yes.
Q. This is AG0008380 through 83. Haven't been consistent throughout the deposition with that.
Did any of the responses indicate in March 2004 that any of your distributors had, in fact, been selling to Body Source?

A. I don't recall. Again, I wasn't personally involved in this.
Q. Okay. Back to Exhibit 12.
MR. COLEMAN: We'll -- I think we'll break in five minutes as planned.
MR. MATTHEWS: We can.
MR. COLEMAN: Actually, why don't we break now?
(A lunch break was taken at this time.)
MR. COLEMAN: Okay. Back on.
Q. Okay. Now, just to kind of finish off where we were. Even though -- I'll represent to you that there are no fewer than three times in the answer where Australian Gold denies a claim by -- by my client that Australian -- that -- that my client purchases all his products from tanning salons, isn't it true that as of right now your -- Australian Gold does not know the suppliers -- it does not know the source from -- for SuppleNet's products?
A. Yes, we've not been told their sources.
Q. You've never been told. What -- if

you found out what those sources were, what would happen? What would you do?
MR. MATTHEWS: Objection. It calls for speculation.
Q. You can answer.
MR. MATTHEWS: Depends on who it is. I'm sorry. I don't mean to testify, Ron.
Q. Assuming it's not the Hatfields or the McCoys.
A. Generally, if a situation would come up, we would make them aware of our contract and agreements and make sure that they're aware that now they are selling to someone that's reselling, because maybe they don't know. Maybe they're being -- I mean, there's a lot of people that lie out there, so we don't what's being told when they're buying their products.
Q. Would you tell the tanning salon that if they continue to sell to Internet reseller that you would instruct the distributor to stop selling to the reseller -- or stop -- stop selling to the salon?
A. We could.
Q. Have you every done that?

A. It's an option.
Q. Have you ever done that?
A. I don't believe there's been a situation where we told a distributor to stop selling to a salon, no.
Q. Now I'd like you to please take a look at paragraph -- page 17 of Exhibit 12 and look at paragraph 10. It says, "Upon information and belief, S&L Vitamins, and/or its owners, own, operate, control, manage or represent at least one retail tanning salon." Do you have any proof that this allegation is true?
A. Is true? I don't know.
Q. What was it that made -- made Australian Gold believe this -- when this pleading was filed?
MR. MATTHEWS: I'm just going to object for the record. This is a pleading drafted by counsel, not signed by the deponent or Australian Gold, and upon information and belief is a proper way to allege. Also -- and moreover, the fact that I'm under a protective order and can't disclose these -- the names of these alleged tanning salons really prohibits my client from commenting on this, but you can answer.

Q. Nah, don't answer it. He's -- he's taken so much of the stuffing out of an answer you can give me, it's going to be worthless. I -- I know the answer anyway. I don't know. Okay, let's move on.
MR. COLEMAN: Off the record for a second.
(A discussion was held off the record at this time.)
MR. COLEMAN: Let's go back on, please. Exhibit 14.
(The Court Reporter marked a document for identification as Exhibit No. 14.)
Q. Have you ever seen the Web site -- I'm going to represent to you that Exhibit 14 is a screen -- screen shot from a Web site called vendatan.com, one word, vendatan.com. Have you ever seen vendatan.com?
A. No, I've never been to it.
Q. Would you -- would you authorize the sale of Australian Gold products through a vending machine? Would Australian Gold authorize such a method of distribution -- or sale, rather, to the end user?

A. -- going to a salon.
Q. Is your answer that that if it were in a salon that it -- it might consider authorizing such a method of sale?
A. Yes.
Q. Have you ever heard of something called a do-not-sell list?
A. Yes.
Q. What's the do-not-sell list?
A. It's a list of mainly distributors, Internet -- unauthorized Internet or unauthorized distributors in general who either had a conflict of interest or the -- not uphold the spirit of our agreement.
Q. I'm sorry. They either -- what was the first thing or the two things?
A. They're either distributors who aren't authorized to distribute our products or Internet flea markets, beauty shops -- or, yeah, beauty supply stores that don't have tanning in general is what it is.
Q. Who gets the do-not-sell list?
A. Our distributor network.

Q. Does it go outside the distributor network, to your knowledge?
A. Not really.
Q. Do you ever share do-not-sell information with the -- the identities of firms identified as do-not-sell companies with your competitors?
A. Absolutely not.
Q. Do you consider Web sites like the SuppleNet to be competitors with your distributors -- or competitors of your distributors?
A. Of our distributors, no.
Q. Why is that? Don't they sell the same product?
A. But they don't offer the same services, so salons wouldn't necessarily buy for that. They'd lose too many benefits.
Q. Those benefits would be again what?
A. Co-op advertising benefits, SPIFFs, different programs we offer, training programs, our premier partnership programs.
Q. Do you have -- have any reason to believe that plaintiff in this case has ever concealed its identity from any person that

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it bought products from?
A. I don't know who they bought products from, so I couldn't answer that.
Q. Do you have any reason to believe that the plaintiff in this case has ever claimed to own a tanning salon?
A. Not that I'm aware of.
Q. Do you believe that as a result of the activities of the plaintiff in this case, including the ones that are alleged in the counterclaims -- you know what a counterclaim is, right?
A. Yes.
Q. -- that the revenue of Australian Gold has been reduced from what it otherwise would have been?
THE WITNESS: Can you read that back?
(The Court Reporter read back the last preceding question, as set forth herein above.)
A. I specifically know there are customers of ours that we have -- either had to give special discounts or different rebates or things to because of sales on the Internet. I don't know specifically that

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they bought from your client or --
Q. Why would customers be entitled to -- to discounts or other consideration?
A. Why would we do that?
Q. Yeah.
A. Because of our integrity, our reputation. We told them that we would protect this marketing channel for them and provide the professional steps throughout the marketing channel, and when they're embarrassed and, you know, don't know how to deal with customers that come in that purchased a lotion on the Internet for $10 less than what they were selling it for, we have to help them how we have to.
Q. When you say "customers," do you mean tanning salons?
A. Tanning salons, yes.
Q. So is that because Internet sales -- or rather Australian Gold merchandise sold on the in -- on the Internet costs less than that distri -- that sold by the distributors?
A. Pardon me?
Q. Is that because the -- the merchandise -- the Australian Gold

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merchandise sold on the Internet costs less than the price from the distributors?
A. Not from the distributors, no.
Q. The distributors are able to match the prices charged by -- by Internet sellers?
A. Distributors don't sell to end consumers.
Q. I'm sorry. I mean, to the tanning -- to the clients that -- I mean, to the customers, to -- to your cus -- to the tanning salons. We should probably never use the word "customers."
MR. MATTHEWS: I'm confused on the question. Just --
Q. All right. Is it the case that you've had to make special consideration for certain tanning salons because your distributors could not match the prices available from Internet sellers?
A. No. The distributors are not involved in that.
Q. Then -- then -- I'm sorry. I must not be following why you had to give special discounts. The people -- people are coming into the tanning salons and complaining about

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the pricing, correct?
A. Or complaining -- yes.
Q. They're saying why should I buy -- for example, why should I pay $66 for this? I can get it on eBay for $18 plus 5.95 shipping. Is that the sort of conversation that your tanning salons are reporting to you?
A. Yes.
Q. So does that mean that -- so -- so have you responded to that by selling directly to tanning salons?
A. No.
Q. Have you responded to that by directing your distributors to give a better price to these complaining tanning salons?
A. We work with each individual situation separately.
Q. How -- what -- what are examples of the individual kind of work that you do with these individuals?
A. We have had to do special co-op programs with them, special partnering programs with them, promotions, spend a lot of our time talking to them and trying to

make them understand that we're doing the best we can and there's not another line out there doing what we do.
Q. When did the Internet problem, the sale -- the unauthorized sale of -- of Australian Gold products on the Internet come to Australian Gold's attention as a phenomenon, as an -- as an issue?
A. I would just be guessing backwards, but probably around 2000, 2001 it came to a head, I would guess.
Q. Has the Internet problem -- let's just call it that -- to your knowledge, as a whole resulted in -- has the Internet problem caused Australian Gold to lose sales?
A. Yes.
Q. You believe that by consumers -- is it your belief that because consumers can purchase Australian Gold merchandise for less on the Internet than they can buy from a tanning salon that fewer units are being sold?
A. I believe that we have lost customer salons or did not get business from salons because of them seeing our products on the

Internet.
Q. So that would qualify as perha -- would -- would that qualify as a loss suffered by the salons?
A. Suffered by us. They can pick up another line or Australian Gold itself.
Q. Why are these salons no longer customers of your distributors, though?
A. They may be. The distributors carry a variety of products.
Q. Okay. But -- okay. You say you lo -- when you say you lost salons, what does that mean? They're no longer selling AG products?
A. There are some that aren't, yes, and there are some that aren't selling all the line.
Q. And is -- and is that because they can't compete with the Internet pricing?
MR. MATTHEWS: Objection to the form. You can answer, if you can.
A. They can compete -- I assume they can compete because I don't care what they sell a product for, but they -- the reputation, their integrity, having to deal with I found

this out there, you're not doing anything about it is horrible for them. I mean, these people are businessmen and women.
Q. Are people bringing them counterfeit merchandise? Is that why they're complaining?
A. There have been instances where we received counterfeit product, yes.
Q. Can you give us the name of a -- of a salon that ceased to be a customer because of a counterfeiting issue or a damage --
A. Counter -- not counter -- not counterfeiting.
Q. Not counterfeiting. So are you really saying that -- when you say "integrity" -- that tanning salons are not interested in -- in buying a product that can be bought -- that they can't sell at a price that's competitive with the Internet price?
A. They can sell at a price that's competitive with the Internet price. I don't --
Q. They can?
A. But -- yes, but it affects -- I mean,

their overhead is a lot more than somebody that's selling it over the Internet, so.
Q. In other words, they -- they could -- as a loss leader perhaps, they could still sell it, because they -- they're still able to get it cheaply enough from distributors that would be -- that they could match the Internet price, but they're not interested in doing that?
A. Some would be. Sometimes it's after the fact.
Q. Without your necessarily knowing how much Australian Gold merchandise is sold by Supplenet.com, doesn't it strike you as -- at least possible that because customers are able to buy the product for less that you might actually be selling more of the product?
A. Does it strike -- it's possible, yes, but it's not the business model we choose to distribute our products, so we're willing to lose that.
Q. That's understood. You're willing to lose that additional -- those additional sales in order to maintain the integrity of

Q. Are you aware of any reports of --
MR. COLEMAN: Scott, your -- you point is well taken. We can --
MR. MATTHEWS: I just don't want -- I -- I know you can do it. I don't want to -- I just want to have that objection there, because we've prepared her on the topics we thought and -- and we've discussed that and she prepared, but to the extent we have due diligence that we -- if you're asking I want all instances of confusion, which I assume is your next question, I don't want us to be bound by that.
MR. COLEMAN: Well, again, I think we're going to have to insist --
THE COURT REPORTER: I can't hear you.
MR. COLEMAN: Why? Because I'm talking to the floor?
THE COURT REPORTER: Yes.
MR. COLEMAN: And I thought you were a pro.
MR. MATTHEWS: I'm not telling her not to answer.
MR. COLEMAN: No. But -- but if your

objection -- I think we do have to get to the bottom of your objection, because if -- if -- if I end up having to live with it, then I'm -- then I'm going to have a problem of you being able to distance yourself from the answer.
Financial losses suffered by Australian Gold as a result of plaintiff's action. I'm going to take the -- the position that actual confusion may have -- may have the effect of -- of an actual financial loss.
Q. Are you aware of any actual confusion that was experienced by an Internet user who came upon one of my client's Web sites and thought this must be the Australian Gold official Web site?
A. Well, I don't know of anyone that's went to your Web site, so.
Q. Do you have any reason to believe any consumers would have a preference as to whether they bought it from an authorized -- bought the same merchandise from an authorized retailer as opposed to buying it from my client or on eBay?

A. I know personally I do. I don't -- I mean, I would assume people do.
Q. What are -- okay. Well, actually you've answered that.
Are you aware of the Indoor Tanning Association?
A. Yes.
Q. What is the Indoor Tanning Association?
A. It is the trade association for indoor tanning.
Q. And is Bill Pipp on the board of directors --
A. Yes.
Q. -- of the Indoor Tanning Association?
That's a yes, correct?
A. Yes.
Q. Is it the only trade association for the tanning industry?
A. There are other associations.
Q. What are -- what are they?
A. I don't know. I mean, several of them want to start their own, but there's been several attempts.
Q. Is ITA the

A. ITA's the one --
Q. The one --
A. -- all the major manufacturers belong to, yes.
Q. Does the ITA do anything in terms of public education in terms of risks or dangers associated with tingle products?
A. Not that I'm aware of.
Q. How about other -- other aspects of consumer safety? Is the ITA involved in that at all?
A. I believe on their Web site they have a responsibility or tanning responsibility or something to that effect.
Q. Does the -- does Australian Gold contribute dues to the ITA?
A. Yes.
Q. Are dues the same for every member or industry leaders like Australian Gold, do they -- do they pay a larger percentage of its operating budget?
A. That's a good question. I --
Q. Fair enough.
A. -- sign the check. I don't know --
Q. It's good to be in an association.

A. -- how it's determined.
Q. Okay. Is it fair to say that the -- the view of Australian Gold, is that the expertise in tanning safety, is that person who is the tanning salon interface, in -- in other words, the person at the tanning salon who serves the customer?
A. It's the responsibility of that person, yes.
Q. Does Australian Gold ever consult with any medical experts in -- in connection with issues like tingle products or other safety issues?
A. What do you mean by "medical experts"?
Q. Physicians.
A. Prior to coming out with a product or -- I mean, what --
Q. On an ongoing basis.
A. No, not generally.
Q. Not generally?
Has any governmental unit ever taken an action against Australian Gold because of any kind of risk or danger perceived or -- or real in -- with respect to its product?

A. We had the FDA issue --
Q. FDA --
A. -- that we discussed earlier.
Q. Right. And they -- your testimony was that they review labeling?
A. Labeling and ingredients.
Q. If a consumer walks into a tanning salon and requests a bottle of Australian Gold tanning lotion, is there any way for Australian Gold to make sure that the employee at the tanning salon actually gives him any instruction?
A. I mean, it's our goal to -- from a liability standpoint to protect our -- ourself to train the employees to provide the best education and information on the products to the salon customer. There are salons out there, may hire somebody new, may not have -- you know, it's always possible that something can happen, but we do the best that we can do.
Q. So you really have no way of knowing what they ultimately will do, do you?
A. Not every single salon individual.
Q. The majority of them, do you know

what they do?
A. The major chains we go to -- I mean, there's a lot of salons we go to regularly. There's -- locally we're more likely to go to them than -- there's 20 -- over 25,000 salons, so we don't get to every single salon --
Q. Do you get --
A. -- every six weeks.
Q. I'm sorry. Did -- how -- how many do you get to in the course of a year?
A. I don't know. I have to figure that out. I don't know.
Q. But when you visit these salons, would you have any way of knowing how they interact with customers when you're not there?
A. No, we don't monitor them. We don't have them on video.
Q. Tanning salons, there --
MR. COLEMAN: Withdrawn.
Q. Do you know if any foreign government has any -- taken any regulatory or legal action against Australian Gold as a result of the products that are sold abroad?

A. We have had issues in Holland, yes.
Q. What kind of issues?
A. There was a quality issue with a water -- type of water that was used or something.
Q. In the -- in the product?
A. Eight or nine years ago.
Q. Did -- did -- did it have to do with labeling?
A. We have labeling requirements for Europe, yes.
Q. Are they different from the requi -- for the -- from the US requirements?
A. Yes.
Q. How are they different?
A. I would have to -- I don't know exactly, but we work with our distributors over there. We only have two distributors so that we have control over making sure everything is correct. They have to have import agents and different things.
Q. Is there -- speaking of those labels, are they -- are they protected by copyright registration?
A. Yes, we do have copyrights.

about likelihood of confusion here.
We're asking what kinds of stuff happened and after all, you signed these interrogatories, so these are all facts that you have personal knowledge of. It says at the end that there were complaints lodged by the general public to Australian Gold concerning the sale of the products by Internet retailers. What kind of complaints were those?
A. I think you handed one of them where the salon was complaining and asked -- he asked right there is it authorized, not knowing are they legitimate to sell the products or not.
Q. That was a salon, correct?
A. Yes.
Q. Were there complaints by the gen -- I'm assuming, perhaps I'm reading this incorrectly, that by the general public we're talking about not the salons which are part of the tanning community, if you will, but cust -- but end users. Are you aware of complaints by end users to Australian Gold regarding Internet sales?

A. We have some situations, like I spoke, where people have gotten products that were half filled or had Vasoline Intensive Care in them or things like that. So, I mean, I don't have the details in front of me, but we have had issues.
Q. It says on -- in the answer to Interrogatory No. 4 and a few other places too, "Australian Gold" -- I'm going down to the fourth line from the top. "Australian Gold has spent in excess of $1.5 million on maintaining its distribution system and training its employees, distributors and tanning salons on the proper use of its products." Did that number come from you?
A. Yes, from my team.
Q. Now, is $1.5 million over the course of more than one year?
A. In the last three or four years probably. I -- I would have to get the exact numbers, but we spend money on -- I mean, we have two people there. All they do is go out and train. We have a staff of eight different sales representatives that go out to salons and to distributors and work

with them to improve their info -- knowledge on the products. We have -- you know, every time I have to get involved, that's a dime or two, you know, so it -- it adds up very quickly and --
MR. COLEMAN: I'm going to ask your lawyer to supplement his discovery. We can do this in writing, but to break out that number -- I wouldn't want to ask you on -- on one foot to tell me where that number came from because you don't have the numbers in front of you.
But it's one and a half million dollars real money to you and me, but I would like to see -- we -- we need more information and I think we're entitled to it as to when -- when the starting period is for that one and a half million and what -- what is being included in there. And we'll follow-up with a written.
MR. MATTHEWS: I'd just ask you follow-up in writing.
MR. COLEMAN: Yeah.
MR. MATTHEWS: Ask what you want; we'll pass it on.

Q. Okay. Now, in paragraph 5 -- I'm sorry. On page 5, Interrogatory No. 7, the first sentence -- the question is, "Set forth in detail the damage to defendant's, 'distribution system,' allegedly caused by plaintiff's conduct as described in paragraph 7 of defendant's counterclaim."
Answer, "The plaintiffs have undermined Australian Gold's distribution system by illegally obtaining the products from one or more authorized distributors through means which Australian Gold is still investigating."
In fact, isn't it true that as of this date you still have no proof whatsoever that has ever taken place?
MR. MATTHEWS: And I will object to the form of the question in light of the fact that she is only entitled to limited information and knowledge as to the suppliers and the source which your clients are getting them. Subject to that, she can answer that.
MR. COLEMAN: Well --
MR. MATTHEWS: Because -- because the lawyers may have proof at trial on that.

MR. COLEMAN: That's right.
MR. MATTHEWS: Okay.
MR. COLEMAN: I mean, you know --
MR. MATTHEWS: I don't want this to appear in a -- in a summary judgement brief that Australian Gold has no proof, and we have proof and --
MR. COLEMAN: Well, she's certified to the proof of this statement which was not made upon information and belief. So I assume she didn't make it unless she believed it to be true.
Q. But now I'm asking to her whether in light of what she's come to understand about the facts of ground now, notwithstanding the -- the -- the limitations of the protective order, you -- are you aware of any distributor who is one of your authorized distributors from whom my clients directly purchased Australian Gold products?
A. I don't know who your clients are purchasing Australian Gold products --
Q. You --
A. -- so I can't --
Q. You don't know -- did you know when

you wrote this who they were buying the products from?
A. We have some -- some thoughts of some people that could or could not be. We -- we believe that there's something going on. We don't know the details of yet.
Q. But here it says the -- that the plaintiffs illegally obtained the products. Is it fair to say that you were overstating what you really knew when you wrote that answer?
MR. MATTHEWS: Objection to the form of the question. You can answer.
A. I mean, all I can say is what I've said before. We believe that it's coming from one of our distributors because of the amount of products and volume that's on the -- on the Web site, and we're still looking to find out who it is.
Q. Have you done some sort of time study analysis that led you to believe that, say, one man in a large vehicle driving around metropolitan New York could not possibly -- even if he filled his days up with buying lo -- tanning lotion at salons -- could not

possibly have purchased the -- the breadth of tanning lotion being sold on -- on the Web site?
A. I've not done a time study on New York city.
Q. It's just kind of a gut -- gut sense that you have?
A. Yes.
Q. Has Australian Gold ever learned of a tanning salon that was simply not maintaining basic safety or tanning responsibility practices?
A. I'm not aware of that, no.
Q. Are there files or is there some sort of centralized place where Australian Gold maintains a record of its monitoring of safety practices by tanning salons?
A. We don't have a safety practice, no. We -- we do it to protect their li -- from a liability standpoint, we go in and work with the salons. It's not a requirement of the FDA or anything else.
Q. Rather it's done for liability purposes?
A. Liability, yeah, make the best for

the customers.
MR. COLEMAN: No further questions.

CROSS-EXAMINATION,
QUESTIONS BY MR. MATTHEWS:
Q. I have a couple very short questions that I want to cla -- clarify for the record.
I believe you were asked in direct examination about contracts with retail salons that Australian Gold has in place and I believe Mr. Coleman asked you a question were there any contracts between Australian Gold and retail tanning salons which prohibited the manner in which or to whom the tanning salons sold products or something to that effect.
And just so the record is clear, are there any such contracts between Australian Gold and -- and retail tanning salons?
A. We have the -- the contracts we spoke about. We also have the premier salon agreement that says they will sell products in their salons and to their tanners -- or in their salons.

Q. Who -- well, are the -- are the registrations -- is there actually a -- when you put out a new label, whether it's a graphic or a text, is there somebody in your office or do you send it over to Ice Miller who makes sure that the registration -- that this cop -- that the -- this new material is actually registered for copyright protection?

A. We do some through our intellectual property attorneys and then we do some ourselves. Just depends.

Q. Have you always -- has this always been the practice at Australian Gold?

A. We may have lapsed at times, but it's been a general practice.

Q. Are the photographs used by Australian Gold in its various promotional products, are they protected by copyright registrations?

MR. MATTHEWS: I'm just going to object to the extent the answer calls for a legal conclusion.

You can answer.

Q. Yeah. I mean, I don't see how it possibly could. It's a yes or no question.

You have a piece of paper that says registered copyright or not.

A. The -- I mean, like on our catalog it's registered copyright, but every photo, I don't know if we've done that.

Q. Do you know what it costs to take one of those pictures, one picture of one product, for example? Do you have --

A. I'd have to pull the budget. I don't know.

MR. COLEMAN: Off the record, please.

(At this time a discussion was held off the record.)

(The Court Reporter marked a document for identification as Exhibit No. 15.)

Q. Let's go on to Exhibit 15 and we'll just ask a few questions about the responses to interrogatories, just a few.

On page 3 -- well, the question that began on page 2 is, "Identify all communications between you and any person not your attorneys about the plaintiffs and all the stuff that the plaintiffs do?" So I'm paraphrasing. It says here, "Australian Gold also had a telephone conversation with

Designer Skin about the Web site" -- meaning my client's Web site -- "and whether Designer Skin was taking legal action against S&L Vitamins." Who from Australian Gold had that conversation?

A. Well, it wasn't a phone conversation. I think we cleared that up, right?

Q. Have we?

MR. MATTHEWS: I cleared that up to David --

MR. COLEMAN: Oh, you cleared that up --

MR. MATTHEWS: -- in a supplemental request.

MR. COLEMAN: -- in a supplemental request, okay.

THE WITNESS: Yeah, yeah.

MR. MATTHEWS: So she will clarify on the record actually what occurred.

Q. So why don't you tell us what occurred so that we can be all clear about it.

A. We were in Germany October 28, 29, the end of October, and, you know, there was only a few of us that spoke English.

Because I -- I talked to Brad Grossman twice in my whole life, once there and once five years ago, so --

Q. And Brad Grossman is Designer Skin?

A. Yes, Designer Skin. And we were just talking, and as part of the conversation, we were bragging about everything we're doing with the Internet and we asked if he was doing anything. He couldn't recall, and we asked specifically about this case and he couldn't recall, and that was about the extent of it. It wasn't a lot of detail or anything.

Yeah, it was -- he talked about his products and that was about it.

Q. There is -- okay. Then let's go to -- to Interrogatory No. 3, which begins on page 3. Permit me -- if you find that the context is just absolutely necessary, then we'll go back and we'll belabor the record, but at the top of page 4 where you are listing the sources that support or show likelihood of confusion -- now again, Mr. Matthews has said likelihood of confusion is a legal term, so we -- we're not asking

EXHIBIT F

D. Sheehan, Jr.

Michael's wife.

Q. Did she run the store or work at that store?

A. She used to work there years ago.

MR. MATTHEWS: Let's mark that, please.

(Defendant's Exhibit Sheehan 1, document entitled Australian Gold & Swedish Beauty Premier Salon Bonus Cash Back Partnership Program 3-Year Agreement, is marked for identification as of this date.)

Q. I'm going to hand you what's been marked as Defendant's Exhibit 1. Have you seen that document before?

A. Have I seen it?

Q. Yes.

A. No.

Q. Have you ever seen a document similar to this but perhaps not completed with the handwritten inserts and so forth?

A. Not that I -- well, maybe in the subpoena you gave me. I don't remember what -- I think there was something in there that -- I don't think it was this. I think it was

D. Sheehan, Jr.

actually a distributor contract, if I recall, but I'm not 100 percent positive.

Q. Are you aware of what an Australian Gold premier salon is?

A. I think I am.

Q. What do you understand that to be?

A. To mostly try to carry mostly Australian Gold and Swedish Beauty products and promote them.

Q. Did you have an understanding that premier salons would be exclusively Australian Gold?

A. No.

Q. Did you look for any contracts at either of your tanning salons to see if there were documents between you and Australian Gold?

A. I don't have any.

Q. Did you look?

A. I know I -- I know I don't have them. Where would I look if I know I don't have them? Any paperwork that was ever done was done through Future Industries. They do everything for me.

Q. And Future Industries is one of your

D. Sheehan, Jr.

distributors?

A. Yes.

Q. Do you recognize the handwriting on Exhibit 1?

A. No.

Q. Do you know who Steve Troutman is?

A. No.

Q. Do you know who Karen Meade-Bentlage, B-e-n-t-l-a-g-e, is?

A. Yes.

Q. Who is she?

A. The owner of Future Industries.

Q. How do you know her?

A. Because I deal with Future Industries. I bought equipment from them. That's the first people I think we dealt with when we went into business.

Q. Does Future Industries only sell Yucatan Australian Gold and Swedish Beauty products?

A. No.

Q. What other products does Future Industries sell?

A. Anything I order.

D. Sheehan, Jr.

Q. Would that include the Supre products?

A. Yes.

Q. Would that include Designer Skin products?

A. Yes.

Q. Has Future Industries placed any restrictions on what they will sell Yucatan?

A. No.

Q. I'm going to draw your attention to the first sentence of this document. Yucatan Tanning is written in and it says "Yucatan Tanning agrees to feature, display, offer to sell, recommend, endorse or otherwise promote only Australian Gold and/or Swedish Beauty lotions in the salon."

Since you've never seen this document before, my question is did Future Industries ever have a conversation with you or communicate to you something along those lines?

A. No.

Q. There's a couple of dates on this agreement and one date appears to be March 4th,

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of it and take it for themselves because, you know, I know they've sent us chairs and I let the girls take them home. And I receive it from almost all companies, you know. They ship it to all stores, you know.

Q. Have you ever received the Australian Gold training book?

A. Not that I know of.

Q. Item three talks about free regional trainings geared toward our premier salons and it lists various cities where regional trainings are scheduled to take place.

Did Yucatan ever avail itself to the regional training offered by Australian Gold?

A. No.

Q. Why not?

A. Honestly I never even knew about it. The only things I've ever known about were I believe the Smart Tan Certification and -- I forget the other one that was held at Future Industries. I went to one of them about six years ago. I believe it was Smart Tan.

Q. Was that a training session at Future Industries that you attended?

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A. What do you mean by distributor agreements?

Q. Well, with companies such as Future Industries. Were you aware that companies like Future Industries contracted with Australian Gold --

A. No.

Q. -- to distribute products?

A. No. I mean, I could figure there's some sort of agreement with all lotion companies if you asked me. Obviously I wouldn't have any knowledge about it or know about it.

Q. Did Future Industries ever explain to you any restrictions they had with respect to who they could sell the products?

A. No.

Q. Did anyone else ever explain to you any restrictions to whom the Australian Gold products may be sold?

A. No.

Q. As we sit here today do you have any understanding of any restrictions that might be in place with respect to the sale of

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A. Yes. It was held at Future Industries.

Q. I want you to look at the next paragraph. And I won't read all of this. I'll spare you some of the details.

It says "Under no circumstance shall customer refer to or mean," and then subpart C, "any person who sells to other resellers or buys on behalf of other resellers."

Do you see that sentence?

A. Yes.

Q. Were you aware of any such restriction or definition of what a customer is to include --

A. No.

Q. -- in this provision?

A. No idea. I'm not a distributor. I'm a tanning salon. This you're saying is for a distributor. So I would have no idea.

Q. Okay. Do you have a representative from Australian Gold that you have dealt with in the past?

A. No.

Q. Have you ever spoken with anybody at

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Australian Gold?

A. No.

Q. And so we're clear on the record, Australian Gold's prior company before some restructuring of the company was ETS. So the same question, have you ever spoken with anybody at ETS?

A. No. So just for my own knowledge, ETS isn't Australian Gold anymore? Because I thought ETS was Australian Gold.

Q. I'll explain it to you later.

A. Okay.

MR. MATTHEWS: Let's take a break.

(Recess taken.)

BY MR. MATTHEWS:

Q. Did you do anything to prepare for your deposition today?

A. No.

Q. Did you talk to Larry Sagarin or Steven Mercadante about your deposition?

A. No. I mean, in general, just in general we spoke obviously that I was coming. There was nothing in particular or anything like that.

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Q. Okay. Thank you.

Tell me the circumstances under which Yucatan began selling tanning lotions to S&L Vitamins, Inc.

A. Ready? I was -- you know, S&L, they sold, you know, body-building workout supplements and I get some from Larry for friends and stuff, you know, sell them out of the store. And he had come to me and said, let's -- you know, you want to give me some lotion, we'll barter. I'm going to sell it, I think, I believe actually in the store. I'm not positive, and it just started. That's how it started.

Q. How long ago was that?

A. I'm not good with time, but I would say three years roughly.

Q. Do you remember how much you traded supplements for lotion?

A. No. I mean, it wasn't -- in small amounts. You know, I don't buy a lot of supplements from him. And then as it got -- he started ordering more, he just paid for them.

Q. Did you have any conversations with

Mr. Sagarin as to what he was going to do with the tanning lotions?

A. He just said he was selling them.

Q. Did he tell you he was going to sell them on the Internet or did he say in a store or do you remember?

A. I don't think we really ever discussed it that much until it -- you know, maybe even until it came to this, you know.

Q. How big was that first swap as far as products?

A. Oh, $50. I don't know, but it wasn't, you know, anything big.

Q. How do you know Larry Sagarin?

A. I met him in private school when we were kids.

Q. Are you guys the same age?

A. No. Larry I believe is two or three years younger than me.

Q. Had you stayed in touch throughout the years?

A. No. I hadn't seen him after private school for a while and then I -- I think I ran into him when I was bar tending and then we

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slowly became friends again. I used to see him at the gym and we became friends again.

Q. Did you go to him and ask to sell supplements in your tanning salon?

A. Ask him? No. I just bought them. I mean, you know, I work out a lot. A lot of my friends work out. So, you know, they knew I knew him. If I need -- to this day, you know, if one of my friends needs some protein or something, I just get it from him.

Q. Okay. And that's what I'm just trying to understand, how you came about deciding to offer supplements in your tanning salon.

A. I don't really offer them like they're on the shelves. It's more or less for friends, you know. And a lot of the stores do. I just don't have that much room.

Q. Okay. Tell me -- obviously over time you continued to sell more and more tanning lotions to Larry Sagarin, correct?

A. Yes.

Q. Tell me how that developed as time went by?

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A. Well, how do you mean developed? I mean --

Q. Well, just tell me --

A. -- slowly his orders would get bigger and more frequent.

Q. Okay. Let's do it this way. How frequently after that first order did he place additional orders for tanning lotion?

A. I can imagine there were probably weeks -- when it first started, you know, he took a little bit here and there and then it just, you know, became more frequent.

And it would vary on the time of year also obviously as, you know, the tanning varies and, you know, how busy you are. Springtime obviously you order a lot more and then summer, winter, you know, the orders were much smaller and much less frequent.

Q. In the busiest time ever how frequent were his orders?

A. Probably three or four times a week, two, three times a week.

Q. And what would an average order be?

A. I mean, it could go anywhere from 2

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to $300, you know, maybe a little fill-in order to 5,000.

Q. We're at March 29th as we sit here today. Is this considered the busy season in the tanning industry?

A. Supposedly.

Q. I take it --

A. Not for me, but yes.

Q. All right.

A. April and May I believe are for the whole country the two strongest months and March and summer isn't far behind.

Q. How recent has it been that Mr. Sagarin was placing two, three, four orders per week from you?

A. I believe last week he placed two.

Q. Do you recall the amount of those orders placed last week?

A. That's a good question. I believe one was about 4,000 and one I believe was fifteen hundred sixty some dollars.

Q. Is that his cost or your cost?

A. That's my cost.

Q. In the off season, the slow times,

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what was the frequency of the orders placed by Mr. Sagarin?

A. I mean, I could probably go weeks. You know, I mean, don't hold me to it, but I could probably go a couple weeks without ordering anything and then maybe put in one or two orders. You know, nothing like it is in the busier time.

Q. Even in the slow times were the orders still consistent if less frequent?

A. No, they were less frequent and smaller.

Q. Was there ever a period of time where the orders stopped, let's say, for example, a month that you didn't receive an order?

A. I don't believe that long, no.

Q. I may have been a little imprecise here and I apologize. I said how frequently did Mr. Sagarin place orders and I meant Mr. Sagarin or Mr. Mercadante or someone at S&L Vitamins. Did you understand that when you answered?

A. Yes, I did.

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Q. Did Mr. Mercadante or does Mr. Mercadante ever place orders?

A. Yes.

Q. Does anyone else other than Mr. Sagarin or Mr. Mercadante place orders on behalf of S&L Vitamins?

A. No.

Q. Who places more orders, Mr. Mercadante or Mr. Sagarin or is it equal?

A. I'd say it's probably pretty equal. If anything, maybe Steve, Mr. Mercadante.

Q. Tell me how that transaction works as far as S&L Vitamins placing an order with you?

A. By transaction you mean how they get their merchandise and pay for it?

Q. From the very beginning how they place their order -- and I may stop you, but generally I want to know how they place the order and how that product ultimately arrives in their store.

A. They will call me and give me the order over the phone and then I will order it and when the product gets there, they will come

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along with the product?

A. Yes.

Q. And then once they had checked in the product, they returned the invoice to you?

A. Yes.

Q. And then they send I assume a payment along with that invoice?

A. Sometimes that way or sometimes they would write the check before they left and then go check it. Very rarely is there a problem.

Q. Why did they return the invoice to you?

A. No idea.

Q. Did you ask them to return the invoice to you?

A. No.

Q. Do you know if S&L Vitamins or any of its principals ever dealt directly with one of your distributors?

A. No.

Q. You don't know or they did not do that?

A. I can't tell you for sure, but I would bet my life that they didn't.

tell anybody else who my sources are?

A. No.

Q. What about Mr. Mercadante, did he ever tell you --

A. No.

Q. Let me finish my question. Did Mr. Mercadante ever tell you not to reveal who the other sources were?

A. No.

MR. MATTHEWS: Off the record.

(Discussion held off the record.)

(Defendant's Exhibit Sheehan 3, invoices, are marked for identification as of this date.)

BY MR. MATTHEWS:

Q. Mr. Sheehan, I have handed you what's been marked as Exhibit 3 and that is a group of documents that your attorney gave to us in this litigation. Can you generally tell me what these documents are?

A. Tanning lotion invoices and possibly bulbs, tanning bulbs for myself. I'm not sure.

Q. When you received the invoices back from S&L Vitamins, what did you do with the

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BY MR. MATTHEWS:

Q. Did S&L Vitamins ever pay you in cash?

A. No.

Q. All payments were by check?

A. Yes.

Q. Have you ever had any discussions with Mr. Sagarin or Mr. Mercadante about keeping your identity concealed from Australian Gold?

A. Not until this whole thing started.

Q. Tell me about those conversations. What was said?

A. Basically just that they were -- it was being protected -- I guess protected by the judge to -- so I didn't get cut off.

Q. Did they tell you or ask you not to talk to Australian Gold about this matter?

A. No.

Q. And you haven't talked to anybody at Australian Gold, correct?

A. You.

Q. Except me. I'm their attorney.

A. Yes.

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Q. Okay. Prior to that communication about the protective order in this case, did you have any discussions along the same lines, that it was important that S&L Vitamins' source for obtaining the products be unknown to Australian Gold?

A. No.

Q. Did you think you were doing anything wrong by selling your products to S&L Vitamins?

A. No. And I still don't.

Q. Do you know who Bob Reilly is?

A. No.

Q. Have you told any of your distributors that you were selling products to S&L Vitamins?

A. No.

Q. Have you had any discussions with your distributors since you became aware of this lawsuit about whether or not you could resell tanning lotions that you purchased?

A. No.

Q. Why not?

A. That's what I do, I sell tanning

EXHIBIT G

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ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	05 CV 1217 (JS)(ML)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES, 1-10, Third Party Defendants,	

AUSTRALIAN GOLD'S RESPONSES TO FIRST SET OF INTERROGATORIES

Defendant/Counterclaimant, Australian Gold, Inc., ("Australian Gold"), by counsel, answers Plaintiffs' Interrogatories to Defendant, as follows:

GENERAL RESPONSE AND OBJECTIONS

Australian Gold objects to the Interrogatories served by Plaintiff to the extent that the Interrogatories attempt to impose upon Australian Gold any duties not specifically set forth in

Federal Rules of Civil Procedure. Australian Gold also objects to each Interrogatory that attempts to discover confidential or proprietary information of Australian Gold or information protected by the attorney-client privilege or work product doctrine.

Discovery has also not been completed on many of the subjects inquired about so that full and complete answers may not be able to be given at this time. This General Response and these objections are specifically incorporated into each of the individual responses that follow. Subject to and without waiving any objection, Australian Gold states as follows:

INTERROGATORY NO. 1: Identify all persons who have information concerning the subject matter of this litigation and set forth the subject of each witness's knowledge or information and whether they will be called to testify at trial.

ANSWER: Persons at Australian Gold with specific knowledge and information concerning the subject matter of this litigation include Leslie Hartlieb, John Keiffner, Tracy Ring, and Sarah Webster. These persons have knowledge concerning Australian Gold's business, its distribution system, its distributors, the products manufactured and offered for sale, Australian Gold's efforts to fight diversion on the internet and elsewhere, and plaintiffs' use of the internet to sell Australian Gold products, among other things. Australian Gold has not decided what witnesses it will call to testify at trial. Other persons with information concerning the subject matter of this lawsuit include representatives of S & L Vitamins, Inc., Larry Sagarin and any person or entity that has supplied S & L Vitamins with Australian Gold products.

INTERROGATORY NO. 2: Identify all communications between you and any person other than your attorneys about plaintiffs, plaintiffs' website, or plaintiffs' use of defendants' intellectual property, including trademarks or copyrights. For each such communication, identify the date, time, nature of the communication (telephone, letter, email), participants, and contents of the communication.

ANSWER: Australian Gold has had communications with its distributors regarding S & L Vitamins' website. Documents evidencing these communications shall be produced at a mutually agreeable time and location. Australian Gold also had a telephone conversation with Designer Skin about the website and whether Designer Skin was taking legal action against S & L Vitamins.

INTERROGATORY NO. 3: State in detail each fact or circumstance which defendant contends supports or shows that a likelihood of confusion exists between defendant and plaintiffs because of plaintiffs' use of the marks at issue in this action, and identify all documents and things evidencing a likelihood of confusion.

ANSWER: Objection. Australian Gold objects to this request to the extent that it calls for a legal opinion or the work product of Australian Gold's attorneys. Further, Australian Gold has not yet identified an expert witness who may be called upon to offer expert testimony in this area. Subject to and without waiving these objections, the facts and circumstances which show the likelihood of confusion include: the use of Australian Gold's trademarks in S&L Vitamins' metatags on the website, superimposing "BodySourceOnLine.com" over photographs of Australian Gold products, using Australian Gold's trademarks with Yahoo pay-for-placement service and in the metatags in a manner calculated to capture the consumer's initial interest and then divert the consumer to the Plaintiffs' own website, thereby impermissibly capitalizing on the goodwill of Australian Gold's trademarks, the use of Australian Gold's trademarks without permission or authorization, the fact that Australian Gold has a distribution system which prohibits the sale of its products over the internet and the sale of Australian Gold's products on the internet sends mixed messages to the general public regarding whether such sales are authorized, approved, endorsed or sponsored by Australian Gold, and complaints lodged by the general public to Australian Gold concerning the sale of the products by internet retailers.

INTERROGATORY NO. 4: For each trademark which defendant contends plaintiffs have used in an infringing manner, describe in detail the monetary damages suffered by defendant and identify all documents and things supporting these calculations.

ANSWER: Objection. Australian Gold objects to this interrogatory to the extent that it seeks information related to statutory damages under federal trademark law which may be available to Australian Gold, including Plaintiffs' profits and royalties. Australian Gold cannot make a full computation of the damages it contends that it has sustained because Plaintiffs have refused to provide Australian Gold with business records which would show Plaintiffs' sales of Australian Gold products. To the extent that Plaintiffs make these documents available to Australian Gold, Australian Gold will supplement this answer accordingly. Subject to and without waiving these objections, Plaintiffs' use of Australian Gold's trademarks has caused damage to Australian Gold's reputation and goodwill. Australian Gold promised its distributors and tanning salons that its products would only be available in tanning salons and would not be sold on the internet. Australian Gold has spent in excess of $1.5 million on maintaining its distribution system and training its employees, distributors and tanning salons on the proper use of its products. Further, Australian Gold reserves that right to designate an expert witness to testify as to the monetary damages of Australian Gold's goodwill and reputation.

INTERROGATORY NO. 5: For each trademark which defendant contends has been diluted by plaintiffs' actions, describe in detail the facts which support this contention, and describe the monetary damages suffered by defendant and identify all documents and things supporting these calculations.

ANSWER: See answers to Interrogatories Nos. 3 and 4.

INTERROGATORY NO. 6: Set forth in detail the damage to defendant's goodwill and reputation allegedly caused by plaintiffs' conduct as described in Paragraph 7 of defendant's counterclaim.

ANSWER: See answer to Interrogatory No. 4.

INTERROGATORY NO. 7: Set forth in detail the damage to defendant's "distribution system" allegedly caused by plaintiffs' conduct as described in Paragraph 7 of defendant's counterclaim.

ANSWER: The Plaintiffs have undermined Australian Gold's distribution system by illegally obtaining the products from one or more authorized distributors, through means which Australian Gold is still investigating. Upon information and belief, Plaintiffs have conspired with authorized distributors and/or other persons and entities to surreptitiously obtain the products and resell them on the internet. Australian Gold reserves the right to supplement this answer upon taking the deposition of Plaintiffs, Plaintiffs' suppliers and conducting further non-party discovery with respect to these suppliers. At the time of answering this interrogatory, none of Plaintiffs' suppliers had produced documents to Australian Gold's counsel and thus, Australian Gold cannot give a full and complete answer as to the extent of harm caused by Plaintiffs' conduct. See also answer to Interrogatory No. 4.

INTERROGATORY NO. 8: Identify all distributors from whom defendant contends plaintiffs obtained defendant's products.

ANSWER: Australian Gold does not know the identity of the distributors at this time, but its investigation continues.

INTERROGATORY NO. 9: Describe in detail, the training provided by defendant to distributors, retailers, and consumers, respectively.

ANSWER: In a typical year, Australian Gold trains over 30,000 employees, salon owners, and managers in over 600 presentations. Australian Gold has spent approximately $1.5 million dollars on training in previous years. Australian Gold requires all distributors to participate in training programs, and to make their sales associates available two times a year for training provided by Australian Gold. All authorized distributors are also required to hold two seminars each year to train tanning salons on the proper use of the products. Australian Gold has a training department that meets with retail tanning salons to properly train them and answer questions concerning the proper use of the products. Australian Gold also sends its trainers to retail salons to train salon employees. Australian Gold also hosts a yearly distributor's council where it offers further training to distributors.

INTERROGATORY NO. 10: Identify all complaints, lawsuits, government investigations, or regulatory actions taken against defendant related to the safety of defendant's Products.

ANSWER: Objection. This request is overly broad and is not limited in time or scope. Subject to and without waiving this objection. Australian Gold shall produce responsive documents at a mutually agreeable time and location.

INTERROGATORY NO. 11: Identify any contracts which place restrictions on the sale of defendant's products by retailers.

ANSWER: See Distributorship Agreements and Premier Salon Contracts which shall be produced at a mutually agreeable time and location, subject to the terms of a protective order to protect the confidential nature of this information.

INTERROGATORY NO. 12: Please identify each person you expect to call as an expert witness at the trial of this action and for each such person, describe in detail the nature of and grounds for the testimony, the facts and documents upon which the expert based his opinion, and any tests or surveys relied upon by expert.

ANSWER: Objection. Australian Gold has not yet identified its expert witnesses. Australian Gold will identify all expert witnesses in accordance with the case management deadlines. Australian Gold will supplement this interrogatory accordingly.

INTERROGATORY NO. 13: Identify any retailer that has been banned, prevented, restricted, or forbidden from purchasing Products as a result of its failure to train customers in the use of the Products.

ANSWER: Australian Gold is not aware of a situation where a tanning salon has refused or failed to train customers, so the answer is none.

INTERROGATORY NO. 14: Identify each use of defendant's trademarks by defendants in Meta Tags, as alleged in Paragraph 37 of defendant's counterclaim.

ANSWER: See documents produced.

INTERROGATORY NO. 15: State the basis for defendant's contentions in Paragraphs 40 and 90 of defendant's counterclaim that plaintiffs acted to "mislead."

ANSWER: Objection. Paragraphs 40 and 90 of Australian Gold's Second Amended Counterclaim do not reference the word "mislead." To the extent that this reference is to paragraph 42 of the Second Amended Counterclaim, S & L Vitamins' use of photographs of the products with its own name superimposed over the photographs impermissibly suggests a sponsorship, affiliation, endorsement or association between Australian Gold and Plaintiffs. The photographs that Plaintiffs display on the website are misleading because of the manipulation of the photographs.

INTERROGATORY NO. 16: Describe in detail all foreign laws which Products fail to comply with, as alleged in Paragraphs 47 and 54 of defendant's counterclaim.

ANSWER: Objection. This request calls for a legal conclusion as it seeks an analysis of foreign laws related to the sale of Australian Gold's U.S. products in foreign markets.

INTERROGATORY NO. 17: Describe in detail the damages suffered by defendant as a result of plaintiffs' alleged interference with its contracts with foreign distributors, as claimed in Paragraph 75 of defendant's counterclaim.

ANSWER: See answers to Interrogatory Nos. 4 and 9.

INTERROGATORY NO. 18: Describe in detail the "false pretenses" mentioned in paragraph 74 of defendant's counterclaim.

ANSWER: Objection. Australian Gold has not yet had the opportunity to depose representatives of S & L Vitamins and Larry Sagarin. Thus, the extent of their activities is still unknown at this time. Subject to and without waiving this objection, Australian Gold has conducted a diligent investigation to discover S & L Vitamins' sources for Australian Gold products and has been unable to discover that information. Thus, upon information and belief, Australian Gold suspects that S & L Vitamins is using a straw man, false names or other covert means to obtain the products.

INTERROGATORY NO. 19: Describe in detail the basis for defendant's claim in Paragraph 96 of its counterclaim that plaintiffs' website is "misleading in material aspects."

ANSWER: Objection. The Plaintiffs' website speaks for itself. Further, this interrogatory seeks counsel's work product. Subject to and without waiving these objections, see answer to Interrogatory No. 15.

INTERROGATORY NO. 20: State defendant's income and profits from the sale of its trademarked products for the last ten years and the sources of such income and profits.

ANSWER: Objection. This interrogatory is overly broad and vague with respect to the phrase "sources of such income and profits." Read literally, this interrogatory could seek the name of every transaction conducted by Australian Gold over the last ten years. To the extent that Plaintiffs wish to narrow and clarify this interrogatory, Australian Gold would be willing to reconsider any such interrogatory.

INTERROGATORY NO. 21: Describe in detail how plaintiffs' conduct caused defendant to suffer injury in its relations or prospective relations with distributors, as alleged in Paragraph 81 of defendant's counterclaim.

ANSWER: S & L Vitamins' conduct has undermined Australian Gold's distribution system. Australian Gold's business model is based upon having a closed distribution system. When products are sold on the internet, Australian Gold receives numerous complaints from distributors and tanning salons concerning the unauthorized sale of the products. If Australian Gold is unable to manage diversion, then relationships with distributors are compromised. One of the factors that has made Australian Gold very successful in the indoor tanning industry is that it has been able to maintain its distribution system and thus attract and maintain quality distributors.

INTERROGATORY NO. 22: Identify the individual or individuals who participated in responding to these interrogatories.

ANSWER: Leslie Hartlieb.

I certify under oath that the above responses to interrogatories are true and accurate to the best of my knowledge.

By: Leslie A Hartlieb
President

As to objections,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been deposited in the U.S. mail, first class postage prepaid, on the 20th day of January, 2006, addressed to:

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